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Supreme Court of the United States

OCTOBER TERM, 1958

No. 56

UNITED NEW YORK AND NEW JERSEY SANDY
HOOK PILOTS ASSOCIATION, A CORPORATION
AND UNITED NEW YORK SANDY HOOK PILOTS
ASSOCIATION, A CORPORATION, PETITIONERS,

vs.

ANNA HALECKI, ADMINISTRATRIX AD PROSE-
QUENDUM OF THE ESTATE OF WALTER
JOSEPH HALECKI, DECEASED, AND ANNA
HALECKI, ADMINISTRATRIX OF THE ESTATE
OF WALTER JOSEPH HALECKI, DECEASED.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 28, 1958
CERTIORARI GRANTED JUNE 9, 1958

SUPREME COURT OF THE UNITED STATES

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**IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT**

Case #24451

ANNA HALECKI, Administratrix ad Prosequendum of the Estate of Walter Joseph Halecki, deceased, and **ANNA HALECKI**, Administratrix of the Estate of Walter Joseph Halecki, deceased, Plaintiff-Appellee,

v.

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and **UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION**, a corporation, Defendants-Appellants.

Appendix to Appellants' Brief—Filed August 29, 1957

[fol. 1] **STATEMENT UNDER RULE 15(b)**

This action was commenced by the service of a summons and complaint filed August 21, 1953 (Record 529-537).

On September 17, 1953, an amended summons and complaint was served and filed (Record 540-548).

Thereafter on December 1, 1953, an answer was served and filed by defendants-appellants (Record 551-555).

Trial was held before Hon. Edward Weinfeld, District Judge, and a jury, in the United States District Court for the Southern District of New York, on December 28, 1956, January 2, 3, 4, 1957. Verdict was returned by the jury for the plaintiff-appellee and against the defendants-appellants, in the sum of \$62,500 for pecuniary loss to the widow and dependent children, and in the amount of \$2,500 for conscious pain and suffering to the decedent, in the total amount of \$65,000 (Record 1-528).

At the conclusion of the plaintiff's case, the defendants moved for dismissal of the action (Record 334), and for a directed verdict (Record 335). Thereafter, at the con-

clusion of the defendants' case the defendants renewed their motion for a directed verdict (Record 425). These motions were denied by the Court. After verdict, the defendants moved to set aside the verdict and further moved for judgment notwithstanding the verdict and in the alternative a motion for a new trial. These motions were denied by the Court (Record 528).

Notice of Appeal from the order denying the defendants' motion for a new trial; from the order denying defendants' motion for judgment notwithstanding the verdict; and from the verdict of the jury and the final judgment entered thereon was served and filed on January 29, 1957.

[fol. 2]

IN UNITED STATES DISTRICT COURT FOR THE
SOUTHERN DISTRICT OF NEW YORK

EXCERPTS FROM TRANSCRIPT OF TESTIMONY

ANNA HALECKI, the plaintiff, being first duly sworn, testified as follows:

Cross examination.

By Mr. Mahoney:

Q. Mrs. Halecki, at the present time you have an action pending in New Jersey?

Mr. Baker: Just a moment. I object to that. I think that should be subject to the Court's ruling before the question is put.

The Court: Let me see the papers that you refer to.

For the time being I am going to sustain the objection. This may be independent grounds of liability.

Mr. Mahoney: Exception.

DONALD DOIDGE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct Examination.

By Mr. Baker:

Q. Mr. Doidge, what is your present occupation?

A. Electrician.

Q. How long have you been an electrician?

A. About 30 years.

Q. In September of 1951 by whom were you employed?

A. By the K & S Electric Company.

Q. Who is the boss of that company?

A. Mr. George Kuntz.

Q. Now, what was your job with them at that time?

What position did you hold?

A. I was the shop foreman.

.

[fol. 3] Q. How long had you been working with Walter Halecki?

A. I think it was around six years.

.

Q. Now, with reference to the work on this vessel, was it the New Jersey, the name of the vessel?

A. That is right.

Q. Where was that vessel docked?

A. In Rodermond Shipyards, foot of Henderson Street, Jersey City.

.

Q. Did you know at that time that the carbon tetrachloride was dangerous?

A. Yes, sir.

Q. And you had known it for some time before that date?

A. That is right.

Q. Did you discuss the danger of the use of this carbon tetrachloride with the chief engineer at that time?

A. I don't think so. We just take those things for granted. We knew what it was all about.

.

Q. What preparations did you make? Will you tell us that?

4
A. Well, on the Friday afternoon I brought extra air hoses aboard and also brought an exhaust blower from the storeroom.

Q. Now, these air hoses, whose equipment was that?

A. They belong to Rodermond Industries.

Q. And the blower?

A. That was also Rodermond Industries.

Q. With reference to the air hoses, will you tell us what they were for? Will you describe that to this Court and jury.

A. Well, the air hoses were approximately 50 foot in length and they were attached to the pipeline along the dock and brought down into the engine room.

Q. And what were those air hoses used for? Will you tell us.

A. Well, we used it to attach to the spray gun for the carbon tetrachloride, and the other one we used as an exhaust underneath the generator, just turn it on to blow the [fol. 4] fumes of carbon tetrachloride away from the generator as you were spraying.

Q. So that there were two air hoses? One was used and applied so that you could spray the carbon tetrachloride?

A. That is right.

Q. And the other air hose you used to blow air in the face of this man?

A. Away from his face.

Q. You were telling us about the two air hoses which you brought for the vessel and the uses which were made of these air hoses. What else did you bring aboard the vessel on the preceding day, namely, a Friday, before September 29, 1951?

A. Besides the air hoses I took a high compression blower on board.

Q. And this blower, I understand, was a blower which belonged to Rodermond Industries.

A. That's right.

Q. And you brought it aboard the vessel that preceding Friday?

A. Yes, sir.

Q. Tell us what you did, just how you placed it in position and where.

A. When you go down to the engine room, there is a side door on the deck side and then there is a catwalk around the top of the engine room, with a ladder going down into the lower engine room. The blower was placed on the corner of the ladder, blowing so that it would blow out of the open doorway. One end was struck down into the engine room and the other one facing up, to blow out towards the top of the doorway.

Q. Did this blower blow air in or exhaust air out?

A. It blows both ways but we had it on the exhaust position.

Q. Taking it out?

A. Taking foul air out.

Q. Could you give us the dimensions of that engine room?

A. I never measured it but I would say approximately [fol. 5] 40 feet by 30 feet, maybe—40 feet long, fore and aft, 30 feet wide, approximately.

Q. And how high would you say that engine room was from floor to ceiling?

A. From the lower engine room?

Q. Well, that engine room that is involved here.

A. Yes.

Q. From the floor to the ceiling, how high is it?

A. I would say approximately 18 feet.

Q. What other things can you tell us with reference to that room, with (sic) reference to its ventilation—say the doors? Were there doors to the room?

A. Well, there were as I said before. There was one blower that I placed alongside of the door going into the open deck, on the port side, and then there was another door that went up into the galley and then out onto the open deck from there.

Q. So it had two doors, this particular one?

A. Yes, but one was a little bit of a blind alley, the one

going through the galley and out then; out to the open deck again.

Q. Was that kept closed?

A. No, both kept open.

Q. Both kept open?

A. Yes, sir.

Q. How large were these doors, could you tell us?

A. A regular door. I would say about 3 foot.

Q. Three foot what? Wide?

A. Yes.

Q. And how tall?

A. Oh, about seven foot.

Q. Now, preparatory to doing the work that you are required to do, that you mentioned was on a Saturday morning, September 29, 1951, was it necessary for you to purchase any materials or anything?

A. Yes, we had to get the carbon tetrachloride.

Q. Why did you purchase the carbon tetrachloride?

A. For use on the ship.

Q. And why did you select carbon tetrachloride?

A. Because the specifications called for it.

[fol. 6] Q. How much of it did you purchase?

A. I got ten gallons of it.

Q. Can you tell us why you selected ten gallons?

A. Well, we just figured that it would take five gallons per generator to do a thorough job.

Q. And you took ten gallons?

A. Yes, sir.

Q. When did you bring that aboard the vessel?

A. I think I bought (sic) it aboard Saturday morning. I brought it on a truck with me.

Q. Was this purchased by you on behalf of K. & S. Electrical Company, your employer?

A. That is right.

Q. You brought it aboard the vessel, you think, the following morning?

A. Saturday morning, yes, sir.

Q. How much of that was used during the day?

A. I think it was around eight gallons.

Q. What did you do that morning? The first thing you did.

A. I went to see, checked to see if the air compressor had been turned on, and Walter in the meantime attached the hoses to the pipe along the street and put the end of it down in the engine room where it was going to be used.

Q. Where did the particular juice come from for the connection of these air hoses?

A. Well, that came from the standpipe along the street. There was an airpipe running along the street.

Q. From the dock?

A. Yes.

Q. Who turned that on, if you know?

A. We had made arrangements with Rodermond for the engineer to start the compressors up on Saturday morning.

Q. What engineer was that? Rodermond's engineer?

A. Rodermond's engineer, yes.

Q. That is with reference to air hoses. Now, what else was done? What was the next thing done?

[fol. 7] A. We got all ventilators going that we had placed aboard, that is, the blower.

Q. When you say all the ventilators, be specific. What do you mean?

A. First of all, I had to start the shore generators.

The Court: The what?

The Witness: The shore generators.

The Court: What was the function of the shore generators?

The Witness: Well, the ship's generators were dead. Therefore, to have power and light on board we have a generator on shore with cables running to the main board of the ship and attached there so that we can throw any switch and operate any part of the ship while it is in the process of repair.

Q. Now, this ship's generator which you say was dead, that was dead on this particular day, is that right?

A. No, sir.

Q. It was dead before that?

A. The generators were not running while it is in repairs.

Q. Was it dead, this generator, during the entire time that the vessel was there from that Monday morning on?

A. That is correct.

Q. So you got your power then from shore?

A. That is right.

Q. Then you turned on this power or the power was turned on, as you described it? Tell us what it did.

A. Well, it energizes the main switchboard on the boat, and that, in turn, we throw the switch and start the blower motors for the ship's ventilators.

Q. So it starts the ship's blowers, the ship's own ventilating system that morning?

A. Yes.

Q. What time did that start?

A. 8:30.

Q. Did the ship's generators which you started, did they [fol. 8] keep going during the entire time that you did this work that day?

A. You mean the ship's blower?

The Court: He said the ship's generators would not operate.

Q. I mean the ship's ventilating system.

A. Yes.

Q. That kept going during the entire day during the time you did this work?

A. Yes.

The Court: Does that take care of both intake and exhaust?

The Witness: Yes.

Q. These blowers that you had, that is part of the ship's blowers, was that all blowing air in?

A. I think so, sir.

Q. But the portable, the one you placed in there, you described, and brought up to shore, that was the exhaust that took the fumes out?

A. That is right.

Q. The blower which you installed, was that kept going all the time from the time you started doing your work until the time you finished your work?

A. It was.

Q. Was there anything else with reference to the ventilation that you kept going during that entire time?

A. Well, the extra air hose that I had was tied down to the base of the generator and turned on, not full, of course, but partly turned on allowing air to come out that way to circulate, and then, of course, we had the oscillating fan which was also going.

Q. And they all kept going during the entire time you did your work?

A. Yes, sir.

Q. Did you bring anything else on the vessel for the work to be done that day for the cleaning of the generators with the carbon tetrachloride?

A. Yes, I brought three gas masks down there on Saturday morning.

[fol. 9] Q. And they belong to your own firm?

A. K & S Electric, yes.

Q. And you brought that aboard the vessel that Saturday morning?

A. Yes, sir.

Q. Did each of you use a gas mask?

A. Yes, sir.

Q. And who was on the vessel other than you and Mr. Halecki, that Saturday morning?

A. There was only a watchman.

Q. A watchman for the vessel?

A. That's right.

Q. Will you tell us the procedure that you pursued when you started this spraying? How did you do that?

A. Well, we have the air and everything on. The spray gun is attached to one of the air hoses. The spray gun itself has a suction hose that went down into the can of carbon tetrachloride, forming a suction and spraying into the generator coils and the armature.

Q. Tell us just what went on there?

A. Well, the hose from the spray gun goes right into the can and wherever you move, there was only about three foot of hose on it, and whenever you moved you had to move the can with it. So we started spraying, as I said, about nine o'clock, maybe, and we sprayed for about maybe ten, fifteen minutes and then we would go up on deck or maybe up in the messroom.

Q. During the period of time that he was doing the spraying, during that day, did he wear a gas mask?

A. Oh, yes.

Q. He wore it at all times?

A. Yes.

Q. When he left the vessel—I am talking about Mr. Halecki—did he say anything to you with reference to any [fol. 10] thing concerning his condition at that time?

A. The only thing, when I was leaving him, we were up on the street, and the only thing he said to me was that he had a peculiar taste in his mouth, but that is the only thing that was said.

(Cross examination.

By Mr. Mahoney:

Q. You have identified for Mr. Baker certain documents that were described as repair lists and things of that nature. Were they given to you by Rodermond employees, Mr. Doidge?

A. As I said before, I am not sure. They could have been or it could have been handed to me by my boss.

Q. At any rate, they were not given to you by any Pilots Association's members.

A. Oh, no, no.

Q. Do you know who recommended those specifications?

A. Rodermond Industries prepares them.

Q. Your orders for coming aboard the Pilot boat to do

this particular work from Mr. Kuntz, your own employer, isn't that right?

A. That is correct.

Q. You were not given any particular orders as to the time when the work was to be done, were you?

A. No, sir.

Q. I believe you told me at one time that the time schedule was up to yourself, isn't that right?

A. That is correct.

Q. Before you worked on the Pilot boat in New Jersey, I believe you testified that you had used the same substance many times before, is that right?

A. Oh, yes.

Q. I believe you have stated before today that using carbon tetrachloride to clean generators was the customary method before September of 1951?

A. Yes.

[fol. 11] Q. And was a method with which you were completely familiar, is that right?

A. Oh, yes.

Q. You had done this job in connection with or in the company of Mr. Halecki before this occasion?

A. That is true.

Q. And as far as you know, he was familiar with that substance too, isn't that right?

A. Yes.

Q. And I believe that on some occasions, at least, you had used carbon tetrachloride, even when it was not so specified, is that true?

A. That is possible.

Q. You are an electrician by trade, Mr. Doidge, is that right?

A. Yes.

Q. And not all of your work is done on ships, is that true?

A. That is true.

Q. And I suppose you have cleaned generators and factories and buildings and other places on shore as well as

on ships? And have you ever used carbon tetrachloride in places like that?

A. Yes.

Q. You yourself were in charge of this work, is that correct, Mr. Doidge?

A. That's correct.

Q. And on a prior day, a Friday, when you actually did the job, this equipment was assembled by you and the decedent, is that right?

A. Yes.

Q. And it was under your direction, is that right?

A. Yes.

Q. And I think you told us you took air hoses aboard the ship. Will you tell us once again who owned the air hoses?

A. The air hoses belonged to Rodermond Industries.

Q. And you took blowers and assembled them in certain places in the engine room?

A. We took one blower aboard.

Q. And that belonged to whom?

A. Rodermond Industries.

Q. And you assembled that yourself?

A. We just had to tie it and plug it in.

[fol. 12] Q. Did Mr. Halecki assist you in doing this work?

A. He did.

Q. As far as you know, these air hoses were not defective in any way?

A. Oh, no.

Q. There was no substance that leaked out of them or anything like that?

A. No.

Q. Where did the power come from that operated this equipment?

A. The power came from the shore generator.

Q. And the pilot boat New Jersey was a dead ship; is that right?

A. You might say partly because the power from the generator ashore was attached to the ship's switchboard.

Q. At any rate there was no power originating from the ship itself?

A. No, no.

Q. And that had been the case all week, I think you told us.

A. That's right.

Q. The generator that did actually power this equipment was on the shore; is that right?

A. Yes.

Q. And who owned that, please?

A. Rodermond Industries.

Q. Had it been operating all right?

A. Oh, yes.

Q. And I think you yourself started, is that correct?

A. Yes.

Q. And it was operating all right then?

A. That's right.

Q. This same generator was used to give power to the vessel's own equipment; is that correct?

A. Yes.

Q. And by that term "vessel's own equipment", do you understand that we are referring to the equipment that was part of the ship itself?

A. Yes.

Q. As distinguished from anything you had brought aboard.

A. That's right.

Q. And as long as you worked on the ship, that ventilating equipment was operating properly, was it not?

A. Yes, sir.

[fol. 13] Q. Now there is no doubt in your mind that all during the time of the work, the blowers were blowing air properly and the entire apparatus was operating properly, is that correct?

A. That's right.

Q. And when you started to work that morning were you satisfied in your own opinion that this was adequate ventilation for the men to work with carbon tetrachloride?

A. Well, sir, I am not an engineer but I was satisfied it was sufficient.

Q. You were satisfied it was sufficient?

A. That's right.

• • • • •

Q. I think you told us that there are ducts leading from the engine room to the open air above?

A. On the ship's ventilating system?

Q. Yes.

A. That's right.

Q. And these were blowers?

A. Yes, powered by each one.

Q. And they operated by an electric motor?

A. Yes.

Q. Do you know the horsepower in these electric blowers?

A. Not now I don't.

Q. Did you take notice of it at that time as an electrician?

A. Yes.

Q. Was it your opinion at that time that this motor was adequate for this purpose?

A. As far as I could see, yes.

Q. Did you have occasion, when you were in the engine room, to stand under these ducts and feel the air come in?

A. You could feel it all over.

Q. There was no question in your mind that there was fresh air coming in through these ducts, is that right?

A. That was blowing in, right.

• • • • •

Q. This carbon tetrachloride is a solvent, isn't it, to dissolve grease?

A. Yes.

Q. Can you tell us just briefly how a man using it operates? It is sprayed on by this air gun that you told us [fol. 14] about?

A. No, it is something like a paint spray gun.

Q. And it forces the substance onto the metal surface of the generator, is that correct?

A. Well, into the coils.

Q. And what happens?

A. The coils on the armature.

Q. And what happens then?

A. Well, it just penetrates in there and washes the grease and foreign particles out of there.

Q. There wasn't anybody else inspecting your work on the day in question, was there?

A. No, sir.

Q. This watchman you told us about—he had nothing to do with the work, did he?

A. No, sir.

Q. And nobody connected with the Pilots Association—and by that I mean the chief engineer or anybody else—they didn't direct you as to how you assemble these various pieces of equipment, did they?

A. No.

Q. That was all up to yourself; is that right?

A. That's right.

Q. And as far as you know, you assembled it all properly?

A. That's right.

Q. And as far as you know, you assembled it properly. Were any complaints made to you by the decedent during the day about the way this equipment was operated?

A. Not during the day, no.

Q. Did he ever make any complaints about how the things were set up or how they operated?

A. Oh, no, no.

Q. And I think you told us that this blower was equipped by yourself to suck air out, to exhaust the air; is that the idea?

A. That's right.

Q. Was that working all right?

A. Oh, yes.

Q. Do you feel the power taking the air out?

A. I sure do.

Q. In addition to these doors that you mentioned, wasn't [fol. 15] it a fact that there were skylights or ventilators overhead that led right out to the open air?

A. Yes.

Q. And were they open during the day?

A. Yes, they were open about six inches to a foot.

Q. Just one more question, Mr. Doidge. Is it your opinion that the ventilation on the boat was adequate on the day you worked there?

A. As far as I am concerned, it was, at that time, anyway.

DONALD CHRISTIE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Mr. Christie, what is your position?

A. Personnel manager.

Q. And that is with what company?

A. Rodermond Industries.

Q. With reference to any of this work that is listed in these last two exhibits—was any of it subcontracted out by the Rodermond Industries to another company, if you know?

A. I believe so.

Q. Was the electrical work subcontracted out, as far as you know?

A. Yes. We don't have any electrical workers.

Q. You don't have electrical workers. So that you subcontracted it?

A. Yes.

Q. And to what company did you subcontract it? Can you find that out from your records?

(Witness examines)

A. K & S Electrical Company.

Q. Do you know (sic) if you have a written contract with [fol. 16] the K & S Electrical Company?

A. That I don't know. That would be in the office.

Mr. Baker: That's all.

Cross examination.

By Mr. Mahoney:

Q. Mr. Christie, were you employed by Rodermond in 1951?

A. Yes.

Q. Do you have any direct knowledge of this transaction with the Pilots Association?

A. None at all.

Q. No knowledge of your own, is that right?

A. No.

Q. These various exhibits which you have identified were all prepared by Rodermond, were they not?

A. The copies I have, yes.

ANGELO GNASSI, called as a witness on behalf of plaintiff, being first duly sworn testified as follows:

Direct examination.

By Mr. Baker:

Q. Dr. Gnassi, what are you connected with at the present time?

A. Jersey City Medical Center.

Q. And what is your position with the Jersey City Medical Center?

A. Chief pathologist.

Q. Doctor, looking at these hospital records which are now offered in evidence as Exhibit 16, would you first read to this jury the history that appears upon his admission. First, what is the date of his admission, according to the hospital records?

A. 10/2/51.

Q. What is the history as shown on the admission sheet, Doctor?

A. "Chief complaints: Vomiting three days. Patient was spraying generator with carbon tetrachloride on Satur-

day, three days"—then there is an abbreviation "PTA"—and I don't know the significance of it.

[fol. 17] "Felt nauseous that night. On the next day patient had onset of vomiting which still persists. Patient cannot hold anything on his stomach and has a loss of appetite. Patient had headache for two and a half to three days. No dizziness. Patient has been having diarrhea since three days ago; average bowel movements, every half hour, loose, watery; no blood, no abdominal pain; cough since onset of vomiting; non-productive, irritated all over from violent vomiting; oliguria," which means suppression of urine, "one day. Patient has been drinking one-half pint of whiskey a day for five months."

That's the history.

ROBERT P. GAINES, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Where is your office located?

A. In the City of Bayonne.

Q. I called you Dr. Gaines. Am I wrong? Is it Mr. Gaines?

A. Well, we have a PHD in chemistry. The title really does not carry much weight.

Q. Would you tell us a little more about that. What do you mean by 50 to 100 parts per million? How is that figured, doctor?

A. It is very simple. One milligram per liter, or it would be one per million. In other words, your million is your volume, and of that, one part, grains per gallon would be almost approximately the same. That is, one part per gallon would be analogous to one part per million. So work was started in that field, and it was found that in order to dilute a volume down to a safe concentration of, we will say, 100 parts per million, they took one pound of carbon tetrachloride and they found that in order to re-

duce the content of the room with the one pound of carbon [fol. 18] tetrachloride in it down to 100 parts per million, they had to add 225,000 cubic feet per minute in order to get that solution down to the safe limit. That was too extensive an operation, so they worked on ventilation, and then it was found that the most efficient means to remove 850 cubic feet per minute, so today ventilation of a room where carbon tetrachloride vapors are used extensively in industry can be made very safe without much trouble merely by ventilation, and it should be added, in fairness to all, that the ventilation should be and must be from the bottom, that is, from the floor level, because the vapors are very heavy and do concentrate there.

Q. Now, Doctor, with reference to the use of, say, 8 gallons of carbon tetrachloride, and its use by a man in the spraying of carbon tetrachloride in an engine room for a period of from about 9 o'clock in the morning until about 3 or 3:30 in the afternoon, a period of anywhere from 5 to 6 hours, could you calculate for us the approximate concentration of carbon tetrachloride?

The Court: Wouldn't you want to give him the size of the area in which he worked? Don't you need that?

Q. I will ask you that, yes. Now, the size of the area was an engine room which was 40 feet long, 30 feet wide, the approximate area, and it was 18 feet high.

Now, the area contained a number of engines similar to those shown in the photographs which are marked in evidence, which I will show to you.

I show you Exhibit 5, Exhibit 9, Exhibit 10, Exhibit 11, Exhibit 12, Exhibit 13 and Exhibit 14.

Now, on those photographs the letter D means the ducts, and the letter O means the openings.

[fol. 19] The openings were all in the ventilation system of the vessel in the ceiling throughout the various parts of the ceiling, and the ventilation was in the bringing in of the air into the particular room.

In addition, photograph B shows the openings outside of the ducts, the transom openings. In addition, the man was working in a room under the following additional

conditions. There was a blower which was attached and brought into the room to exhaust the air from the room at a distance of about seven or eight feet above the engine floor.

There was also a fan to blow some of the fumes away from his face, which was going. There were also two doors. I think they show in some of those photographs, and they were elevated above the floor, I think a distance of six or seven feet, and he also wore a gas mask of the Army surplus cannister type. During the course of the work he wore that type of gas mask. And, in the cleaning of generators there were two air hoses one of which was used to spray the carbon tetrachloride and the other air hose was used to blow the fumes from the vicinity of his face.

He used, during the course of that day, about 8 gallons, originally brought on 10 gallons in two 5-gallon cans. They used up 8 gallons. The 5-gallon can was kept on the floor of the engine room, and the air hoses were in that can and going to the spray.

They worked in the following manner: he would spray for about 15 minutes and then stop the spraying and go off on the engine deck or elsewhere. He was away from the spraying work for about 15 minutes.

Taking all those facts into consideration, Doctor, could you calculate or reasonably estimate the concentration of carbon tetrachloride that was present under such circumstances?

Now, if you need time, Doctor, I think we are close to the noon hour and—

A. Rather than needing time, Mr. Attorney, I would [fol. 20] much rather be elucidated on a few phases here.

Q. All right.

A. In the first place, the volume which you have given me, 40 by 30 by 18—is that exclusive of the space occupied by these numerous ducts and staircases, and motors, and so forth, or does that include the displaced air?

Q. No. That is the entire area.

A. That is the area. Therefore, considerable air will be displaced within the area which you had given us the dimensions of by the equipment.

Q. That's right.

A. Well, sir, I am not acquainted with this ship. I don't know a thing about it. Therefore I would like to be guided as to whether it is 50 per cent displacement of the ship, or what. I mean, that is a factor to be considered.

Q. Well, would the photographs showing the amount of engines, and so forth, indicate approximately—

A. Sir, I cannot, under oath, give a precise figure unless we agree somewhere that there is a certain amount of air displaced by this machinery. If I judge about 50 per cent, I don't know whether that is fact or just an estimate, but I hope that the Court and jury bear with me because what I am trying to do is, if the dimensions of this room are so much, it has a certain volume, but if we are going to stack extensive bulky furniture in here, we are going to displace a lot of air. I think that is an important factor.

Mr. Baker: Could we have a recess at this time, your Honor, so that I can—

The Court: I will give you the requested recess, but you don't have any information in this record so far on that. You cannot supply that information to him at the lunch hour because it is not in the record.

[fol. 21] Mr. Baker: No, we haven't got that information, your Honor; I agree.

The Court: You can give him no information during the lunch hour on that subject.

Mr. Baker: I can't give it to him because I haven't got such information, your Honor.

The Court: Well, it is a few minutes to one anyway, so we will take our lunch hour recess and resume at 2:15.

(Recess to 2:15 p.m.)

AFTERNOON SESSION

ROBERT P. GAINES, resumed.

Direct examination.

By Mr. Baker (continued):

Q. Dr. Gaines, before the noon recess, I propounded a question to you. The measurements of the room, the engine room, which I gave you at that time were the approximate dimensions which were testified to by a person who was working with the deceased who stated that in accordance with his (sic) opinion, the engine room was 40 feet long by 30 foot wide by 18 feet high.

Considering that as the dimensions, only for the purpose of giving us your initial calculation, and without figuring at all anything in the room whatsoever, but just for the purpose of the first calculation; could you tell us what your calculation would show as to the concentration of carbon tetrachloride?

Mr. Mahoney: Objection, your Honor, in view of the witness's statement in the earlier session, that he would have [fol. 22] to have the approximate area of the machines in the room. I object to any answer based on this hypothetical question.

The Court: Can you give an answer?

The Witness: Yes, I can. Assuming there was no displacements and specifically, on those dimensions of 40 foot by 30 foot by 18 foot, I can give an answer of 21,600 cubic foot of air.

The Court: 21 what?

The Witness: 21,600 cubic feet of air which I converted to liters, 395,712 liters. Then, assuming a standard temperature of 25 degrees Centigrade in 760 millimeters pressure—

The Court: I am going to interrupt now. There is no evidence of temperature, is there? How did we get into that?

Q. Well, without calculating the temperature, can you give it to us?

The Court: Is it requisite that you have the temperature?

A. What I have done here, your Honor, is take what we call a standard temperature of atmospheric pressure. The variation in each case would be small. That is, we are dealing with the vapor stage and as temperature increases, the vapor would be increased. So for standard figures I assume what we call standard conditions, 25 degrees Centigrade, which is the average all-year-round temperature.

Mr. Mahoney: Your Honor, I object to any answer based on facts not in the record.

The Court: I sustain the objection.

Q. Without calculating the temperature at this time—we will calculate the temperature next—will you continue [fol. 23] your calculations?

A. Well, I came to the figure of 20,000 parts per million.

Q. And what is meant by that, 20,000 parts per million? Is that concentration of carbon tetrachloride?

A. That is the concentration of carbon tetrachloride in the room.

Q. On the basis of the use of—

A. 40 by 30 by 18.

Q. On the basis of the use of how much tetrachloride over what period?

A. Six hours, eight gallons.

Q. Now with reference to the temperature, what effect would that have on the calculation you have made of 20,000 PPM—in other words higher or lower temperature?

A. Well, as your temperature increases, your volatility increases, thereby increasing the concentration.

Q. And as the temperature gets lower?

A. The volatilization would be decreased.

Q. Could you tell us how much of a variance there would be between a low temperature and a high temperature, as far as those figures are concerned, if there is any variance?

A. Very little variation.

Q. Very little?

A. Very little, until you get down to the freezing point.

Q. Now Doctor, this is based upon this room without any displacement of any of the engines, or of any parts within the room, is that right?

Mr. Mahoney: Pardon me, Mr. Baker. I must object to any further hypothetical question and answer until the witness has clarified the effect of barometric pressure which apparently was a part of his calculation, and which is not in the record.

The Court: Did you refer to barometric pressure?

The Witness: Yes. 760 millimeters standard barometric pressure. We are dealing with a vapor and two things, two factors that affect vapor are atmospheric pressure and [fol. 24] temperature. That is Charles and Boyle's Laws. As the pressure goes up, the volume goes down. As the temperature goes up, the volume will increase. And since we are dealing with a vapor, atmospheric conditions are to be considered, so, in order to be on the safe side in this hypothetical question I have assumed the ideal average atmospheric pressure and temperature for our latitude and longitude in coming to this calculation.

Q. And what is it that you assumed?

A. I used 25 degrees Centigrade and 760 millimeter pressure.

Q. If there is any variation in that, what effect would it have on your final outcome of 20,000 PPM?

A. It would have very little effect on that huge volume.

Q. And the allowable safe concentration you have indicated before is a figure of less than a hundred PPM; is that correct?

A. By personal choice the 75 parts per million is my own, but the MAC choice is 100.

Q. So that the figure you have of 20,000 is 200 times the allowable safe concentration?

A. Yes.

Mr. Mahoney: In view of the witness's statement I repeat my objection, your Honor. He has assumed facts not in evidence.

The Court: Well, he has also said that the temperature and the barometric pressure would make very little dif-

ference in the end result in that volume. In view of that statement, I will allow it to stand.

Mr. Mahoney? Exception.

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Q. Now, Doctor, we have indicated to you that in accordance with the evidence submitted here, and in accordance with the photographs, there was a ventilation [fol. 25] system by ducts in the ceiling of this engine room in which air was being brought in to this engine room. What effect would that have upon the concentration of carbon tetrachloride in that room?

A. That was covered indirectly in my introductory remarks this morning when I spoke about dilution. Introducing air from the upper level would act as a dilution of the air in the room. We had established on many occasions that you would have to bring in 225,000 cubic feet per minute to bring a concentration down to the safe level.

Now, the answer to your question, sir, would be, A, the effect would be that of dilution. Now, how much dilution, I would have to know how much air is being brought in.

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Q. In addition to that, there was a blower which exhausted from the room, and this blower was located about seven or eight foot above the floor of this engine room?

A. That would have some effect. How much effect, I don't know. What is the capacity of this blower? How many cubic feet per minute is this blower taking out of the chamber? I would have to know that. I will say that it will have some effect.

Q. Would it be sufficient, with the dimensions and the information that has been given to you concerning the amount of carbon tetrachloride which was put into this room during that period of time, would it have sufficient effect to reduce this concentration to a safe concentration?

A. In order to reduce it to a safe concentration, sir, you would have to remove 850 cubic feet of air per minute. If your exhaust fan or blower removes that amount of air, and that is quite a bit of air, then you are having a safe condition, but if it is doing anything less than that, if you

are removing anything less than that, you are having no effect at all, or very little, if any.

[fol. 26] Q. In what areas, in what particular places and areas is the use of carbon tetrachloride dangerous?

A. Well, the first prerequisite is ventilation, adequate ventilation, and if you conquer that, why, then it is all right. It has been for many years a household preparation.

Cross examination.

By Mr. Mahoney:

Q. Doctor, you testified to a calculation that you had made based on certain factors called to your attention by Mr. Baker, and please correct me if my understanding of it is improper. You were given certain dimensions which permitted you to calculate the area of this compartment, is that correct?

A. That is correct.

Q. And you were also given the fact that a certain amount of carbon tetrachloride had been used up over a certain period of time, is that correct?

A. That is correct.

Q. And based on those two factors you were able to calculate the concentration that was present in that compartment on the day in question?

A. The average concentration.

Q. The average concentration over a period of six or seven hours, or whatever it was?

A. Six hours.

Q. Your calculations of so many parts per million average concentration did not take into consideration, I assume, any types of ventilation that were present at that time, is that correct.

A. That also is correct.

Q. So then the figure which you gave—incidentally, would you remind (sic) repeating the concentration which you arrived at?

A. 20,000 parts per million.

Q. Per million. That figure does not reflect the exposure of an individual, does it?

A. That figure represents the concentration of the average—the average concentration of carbon tetrachloride in a [fol. 27] room of that size, and that assumed temperature and at the most frequently used pressure. Exposure, according to accepted figures—exposure from one-half to one hour is dangerous.

Q. Doctor, what I mean is this. You gave a figure which represents concentration. Then you told us that exposure depends upon extrinsic factors, is that right—the types of protection available, the amount of ventilation, and things of that nature? Is that a fair statement?

A. No, I would say that exposure is as it indicates, exposure. Now how much danger or what damage may have resulted from that exposure—then, sir, that depends upon whatever protective measure may have been introduced, whatever there is, such as ventilation or protective clothing, and so forth.

Q. No, Doctor, I am merely asking you to comment on my understanding of your testimony. Would it be fair to state that the amount that penetrates to the individual could only be determined when you take into consideration such safeguards as ventilation, fans, doors, gas masks and so forth?

A. Yes.

Q. Doctor, I ask you, would it be fair for me to interpret the situation in this manner: that a certain percentage of this 20,000 parts per million would be diverted from the individual by the various safeguards that may or may not exist in a given case?

A. Yes. The individual that is exposed is breathing. How much he breathes in will depend upon the protective measurements which you have taken.

Q. * * * Concentration, is it not so, represents the amount of the substance present at a particular time?

A. Yes.

[fol. 28] Q. Exposure could be defined as the amount that penetrates to the individual himself, is that right?

A. That's correct.

Q. Thank you, Doctor. That is my only problem. Now you were never aboard the boat in question, were you?

A. No, I wasn't.

Q. And you had no other knowledge of the circumstances other than those posed to you by counsel, is that right, sir?

A. That's right.

Q. Do you know, for example, the power of the motors which operated the blower system in the engine room?

A. No, I do not.

Q. Would that be an important factor in determining their efficiency?

A. Yes, that would be. In fact, I raised that question.

Q. Do you know the horsepower of the motors in the exhaust system which was designed to draw vapor from the compartment?

A. No.

Q. Would that be an important factor in determining whether or not they were adequate?

A. Yes.

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Q. Would it not be true that the horsepower of the motor which operated this portable exhaust would have an important effect on its adequacy?

A. The horsepower of the motor?

Q. That's correct.

A. Was this blower directed (sic) connected to the armature of the motor?

Q. I have no idea, Doctor.

A. Well, sir, there again you have a transmission problem.

Q. Well, this is a factor which you would have to know in order to determine its adequacy, is that not correct?

A. Yes.

Q. And you do not have that information, do you?

A. No.

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[fol. 29] Q. Doctor, you don't know of your own knowledge in what direction this air hose was pointed?

A. Sir, it appears to be logical that the hose would be going across the face.

Q. Well, that is an assumption, is it not?

A. It is an assumption.

Q. Do you know, for example, what pressure was used in this air hose?

A. No, I don't.

Q. Now, Doctor, do you have any general familiarity with a ventilation system in common use aboard vessels?

A. No, I am not an engineer, and I certainly am not a nautical engineer.

Q. Do you have a general knowledge of ventilation systems?

A. A general knowledge. I wouldn't say specific or adequate or thorough. I could tell them what I want in an official capacity. I mean, I demand this and this ventilation and it is up to the engineers to meet those requirements.

Q. But in your work as a chemist, and in your lectures and your writings on the effect of noxious substances such as carbon tetrachloride you do have a working knowledge, I assume, of the operation of mechanical ventilation systems?

A. Yes, I have an acquaintance with them.

Q. Now, does not the adequacy of any ventilation system depend upon its mechanical power to a great extent?

A. To quite an extent. And also to the design of the ducts.

Q. Now, these are factors which you have no direct knowledge of in this case?

A. No. All I can do is recommend, and that is what I have done. I say that if you want to use this and this substance in this and this room, I want you to be able to remove so much air from this room, and I want the removal from the lower level or the upper level.

Q. In this particular case you have no direct knowledge of such things as the power of the system in use, have [fol. 30] you?

A. All I want them to do is to remove so many cubic feet per minute.

Q. But again I say in this particular case you have no knowledge of your own concerning the power of the system?

A. That would be required?

Q. Yes.

A. No. I could not specify whether to use a quarter horsepower or a half horsepower.

Q. In fact, you don't know what was used, do you?

A. Certainly not.

Q. And I think it is accurate to state that there are masks which may afford complete protection against one exposure which would be entirely used uselessly if used in another exposure?

A. Yes.

Q. Here again you don't know what type of mask was used?

A. No.

Q. You don't know, I assume, how recently the cannisters of that particular mask were inspected, do you you? (sic)

A. No.

Q. So actually, Doctor, the presence of these various devices that have been described to you would affect the concentration to some extent, is that correct?

A. We would have to break that down. I don't think it would be fair to make an all-inclusive answer to that question because there are quite a few factors to be considered.

Q. I haven't asked, Doctor, to give us your estimate of the concentration after these devices had been used, but would it be fair to state that there would be some effect?

A. Yes, there would be some effect.

Q. Well, Doctor, what do you say would determine the efficiency of an exhaust system on board a ship? Would the size of the blades have anything to do with it.

[fol. 31] A. The size of the blades, the shape of the blades, the angles at which they are set.

Q. Well, these are things that you don't have any knowledge of?

A. And the ducts. You asked me a question as to what would be efficient, and I can answer that question. But if you ask me to design it for you—

Q. No, Doctor.

A. You asked me what would be required to go—

Q. I think you have answered the question very satisfactorily, Doctor.

Now, my next question is, is it not a fact that you have no direct knowledge of the circumstances in this particular case?

A. Direct knowledge? No.

Q. Doctor, is it not a fact that any calculation, or any evaluation made by yourself as to the adequacy of the various types of ventilation on board this vessel must necessarily be based on information concerning the size of the equipment used, the pitch of the blade, as you have told us, and other circumstances which are apparently not within your knowledge? Is that not so?

A. Yes.

The Court: The actual concentration in the area, of course, would depend upon the effectiveness of the ventilating units; is that correct?

The Witness: And the amount of material present.

The Court: When you say the amount of material present, I don't follow that.

The Witness: That is, whether they used a pint bottle or a gallon bottle, or five gallons.

The Court: Well, to put it more specifically, I thought my question was clear, you gave a figure of 20,000 parts per million. Is it correct to suggest that that is the maximum which does not take into account any of the ventilating items contained in that?

The Witness: Yes.

The Court: Because in reaching that figure you excluded all ventilating factors.

The Witness: Yes, I used that in a confined area.

The Court: And accordingly the actual concentration per million in that engine room would depend upon the effectiveness of the ventilating units?

The Witness: Yes, and we believe that we used those measurements without allowing for displacement by equipment.

The Court: I understand that. And whether or not the ventilating units were effective or ineffective would depend in some measure upon facts with respect to their operation and efficiency for which you do not have—

The Witness: I am not an engineer.

Q. Well, Doctor, my question in effect was, cannot a person, such a person with a susceptibility, be damaged or injured, seriously perhaps, by a concentration so slight that it would not affect a normal person?

A. Yes, it is possible.

Mr. Mahoney: "When carbon tetrachloride and alcohol are given simultaneously, the toxicity of the former is greatly increased."

The Court: All right.

Q. Do you consider that statement accurate?

A. Yes, that is a good statement.

[fol. 33] Q. You have no idea, I suppose, from what you have told us, whether or not any of these particular devices were operating properly, is that right?

A. Of course, that's right.

Q. You don't know, for example, whether the portable equipment that was brought on board was operating properly, do you?

A. Of course not.

Q. And you don't know, as you have already told us, I think, whether the gas mask was adequate or whether it was operating correctly or whether it was inspected, or anything of the sort, do you?

A. No.

Q. And you don't know whether the permanent ventilation equipment aboard the ship was adequate or not, do you?

A. Of course not.

Mr. Mahoney: That's all, Doctor.

By Mr. Mahoney:

Q. Doctor, from your previous statement, is it correct for us to understand that if the air hose in question was near floor level, that it would be efficient in circulating the air?

A. It would help, yes, quite a bit.

Mr. Mahoney: May I continue?

Q. In view of your prior statement, Doctor, concerning the exhaust equipment which was a permanent part of the ship, I think you stated to his Honor that the existence of an exhaust system would play an important part in your evaluation, is that correct?

A. Yes, I did.

Q. Now, you don't know, for example, how many outlets, permanent outlets, there were aboard this particular vessel, do you, exhaust outlets?

A. No, I do not.

[fol. 34] Q. And you don't know the location of all of the outlets aboard this particular vessel, do you?

A. No, I do not.

Q. And again you do not know whether these particular exhaust outlets were powered by a small motor or a big motor, do you? A. Of course not.

Q. And you don't know whether their shape was conducive to efficiency or whether the length of the blade was six inches or eight inches, or any of those factors are not within your knowledge, are they?

A. No.

Q. Would those factors not play an important part in any evaluation you make of the dilution or the ventilation within that compartment?

Mr. Baker: I object to it.

A. Yes.

Mr. Baker: It is fully answered.

The Court: The answer is yes!

The Witness: Yes.

Redirect examination.

By Mr. Baker:

Q. Doctor, considering these facts to be true—that on September 29, 1951, the deceased, Walter Joseph Halecki, was working in the hold of a vessel, as shown in accordance with the number of photographs which were presented to you during the course of your examination, and considering the fact that he was cleaning the generators in the engine room and that he used during the period of time that he worked eight gallons, or approximately eight gallons of carbon tetrachloride; that he started to work about 9 o'clock that morning and worked until about 3:30 that afternoon; that he did the spraying for 15-minute intervals, namely, worked on spraying for about 15 minutes and then was off and went upstairs and out of that room for about 15 min-[fol. 35] utes, and then went down again; considering the fact that during the course of that spraying he wore a gas mask, Army surplus type, cannister type; considering also the fact that in this room, which has been described as the approximate size of 40 foot by 30 foot and 18 foot high, as the outside dimensions, that there were various generators in this room, two generators, which were being cleaned, and taking into consideration that the ceiling of the room or in the ceiling of the room was the heart of the ventilating system of the vessel which has been shown in these photographs, and that the outlets were in the ceiling; and taking into consideration that in addition to that there was a blower, two air hoses, one used for the purpose of spraying the carbon tetrachloride and the other air hose used for the purpose of blowing the fumes away from the face of the person who was using it, Mr. Halecki; taking into consideration that there was also a fan, a circulating fan, on the floor of the engine room, and that there were also two doors which were above the floor of the engine room, approximately six foot or so above the floor; taking also into consideration that there were transoms which were shown in one of the photographs which were located above the engine

room, as shown in photograph B, which were open; and taking also into consideration the fact that there was a blower which was used to exhaust the fumes from this engine room which was placed and tied to a rail and facing into the engine room, the rail being shown in this photograph, Exhibit 9, and that the blower was facing down into the engine room and tied to this rail shown as in photograph 9, that this blower was operating during the time that this work was going on and was exhausting out; taking into consideration that this man wore a gas mask of the type which has been described for the period of time that he was in the engine room doing this work, and taking also into consideration the fact that when he [fol. 36] went home he complained of a sweet taste in his mouth, or a taste in his mouth, and that he was then confined to bed, he was treated by a physician for several days and then went into the hospital, where the complaints were that on the Saturday previous to his admission he had been spraying the generators, that he had that evening an onset of nausea and vomiting which was still present on his admission; that he had headaches for two or three days prior to his admission, diarrhea and oliguria for one day; taking also into consideration that he was treated at this hospital and, in accordance with the records, he had a renal and hepatic failure, and the final diagnosis was a carbon tetrachloride poisoning, and taking also into consideration that an autopsy was performed on this man, which autopsy showed a carbon tetrachloride poisoning as the anatomical diagnosis with these specific findings: necrosis of the liver, a lower nephron nephrosis, a necrotizing bronchitis with severe hemorrhage, a broncho pneumonia, a subarachnoid hemorrhage, (sic) acites and jaundice—taking all of these factors into consideration and assuming them to be true, would you say that it is your opinion that his exposure to the fumes of carbon tetrachloride was an exposure to an excessive accumulation or concentration of fumes during that exposure?

Mr. Mahoney: Exception, please. With all due respect to the doctor's qualifications, I object to an answer based on medical testimony.

The Court: I sustain the objection, and also on the ground

that I suggested to you that you put a hypothetical question to this witness based upon facts as to which there is evidence. These facts relate to conditions in the engine room. And you have again read into your hypothetical question a great many items which are referred to in the history. [fol. 37] If you will start at the point where he went home, assuming that he went home on such a day—do you follow that?

The Witness: Yes.

The Court: In other words, just referring to conditions in the engine room as they are outlined to you by counsel, do you have any opinion that you can express with reasonable certainty as to whether or not the ventilating system in that room was reasonably adequate in order to remove the fumes?

The Witness: I have an opinion.

The Court: And what is your opinion?

The Witness: My opinion is that it was not adequate.

The Court: All right, that is your opinion. That is all you want?

Mr. Baker:.. That's all.

MILTON HELPERN, called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Direct examination.

By Mr. Mahoney:

Q. Doctor, are you licensed to practice medicine in the State of New York?

A. Yes.

Q. What date were you licensed, please?

A. 1926.

Q. And what is your present occupation, Doctor?

A. Well, I am a physician. I am the Chief Medical Examiner of the City of New York, and also Professor of Forensic Medicine at New York University, Post Graduate Medical School, and Assistant Professor of Clinical Medicine and lecturer in pathology at the Cornell University Medical College.

Q. Doctor, how long have you been associated with the Medical Examiner's office?

A. 25 years.

[fol. 38] Q. Is it possible to state, Doctor, the concentration that would be harmful to the average individual?

A. Well, that is very variable.

Q. Depending on what factors, Doctor?

A. Depending upon susceptibility of the individual. Some people are much more susceptible to the effects of the vapors of carbon tetrachloride than others.

Q. Well, is it possible—

A. Excuse me. That also applies to persons who swallow carbon tetrachloride. In the old days carbon tetrachloride used to be used in teaspoonful doses to cause the elimination of tapeworms and it was commonly used, but a certain number of the patients reacted adversely and it no longer is used for that purpose.

As far as the effect of a given concentration of vapor, that depends on the individual as well as on the concentration. Given to people in the same environment, one may be severely or fatally poisoned and the other person might not even be rendered sick.

Q. Is it possible for a person, given predisposition you mentioned, to be seriously injured, even fatally injured, by an exposure which would be harmless to the average individual?

A. Yes, there are cases like that.

Q. Doctor, can you tell us what factors, within your experience, create this susceptibility or predisposition you have told us about?

A. Well, I think the evidence medically goes to show that the alcoholic person is peculiarly susceptible to the toxic effects of carbon tetrachloride. The alcoholic—especially the person who has been drinking alcohol at the time of exposure—is very susceptible, often to amounts of the poison which might not affect another person, inhaling the same concentration. In other words, in the same incident, two people can be exposed, in the same room, a person under the influence of alcohol and another person

not under the influence of alcohol, and the alcoholic will come down with poisoning and the other person might not even become sick.

[fol. 39] Q. Doctor, would the history of consuming a half-pint of whiskey a day for five months preceded by the consumption of two quarts of beer a day for ten years create a condition of an alcoholic?

A. It would give me the impression that the individual is an alcoholic. If that amount is consumed every day, it would give me that impression. That does not mean that the person is necessarily a person who cannot get along with people, or anything like that at all. If that craving is there, and that much alcohol is consumed, that is a fair amount, and those estimates are usually quite rough. They are never precise, and my own reaction to that is that it is always an understatement rather than an overstatement.

Q. Now, Doctor, such a person as the one you have described, and a person with the history that I have read to you, would that person be susceptible to an exposure—when I say “susceptible” I mean susceptible to serious injury and death—to an exposure so slight that it would not affect the average person?

Mr. Baker: I object to that. There is no evidence here of a slight exposure.

The Court: Well, cast the question in a different manner. Would such a person have a readier disposition to carbon tetrachloride poisoning than a person who did not consume that quantity of liquor?

The Witness: I think yes.

Q. Well, Doctor, assuming an individual with a history of consuming a half-pint of whiskey a day for a five-month period following a history of consuming two quarts of beer a day for a ten-year period, and assuming that individual worked for approximately a six-hour period with carbon tetrachloride, and assuming that individual subsequently was hospitalized suffering from nausea, head-
[fol. 40] aches, and so forth, and assuming that he subsequently showed indications of liver damage, of renal

insufficiency, and that after a 12-day period that individual expired, and assuming that upon autopsy it was found that the individual displayed abnormalities of the liver, do you have an opinion, Doctor, as to the causal relationship between the man's illness and death and his prior history of alcoholism?

Mr. Baker: I will object to it. There are a number of deficiencies in the hypothetical question. How much carbon tetrachloride? To what extent? I mean, there has been evidence in the case to the extent to which he has been exposed and—

The Court: You may ask him about that on cross-examination. I will allow the question.

A. I don't think there is any question that this man died of carbon tetrachloride poisoning. With the history as you gave it, with the background of alcoholism, I think it is also reasonable to conclude that that made him more susceptible.

WILLIAM M. FINKENAUER, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Mahoney:

Q. What is your occupation, Mr. Finkenaure?

A. I am a ship's surveyor and consulting engineer.

Q. You mentioned sometime ago that you conducted some tests aboard the pilot boat New Jersey.

A. Yes.

[fol. 41] Q. Will you tell us what those tests consisted of, please.

A. Well, we put some oily rags into a small tin can and set them on fire to make a smudge, and placed that can at different positions in the lower engine room to see if there was a series of air currents that would carry the air about, and we found out that there was. We could

also see the effect on the smoke of the air that came down through the blowers.

Q. Well, will you tell us what effect the blower and exhaust system had upon these smoke pots that you told us about?

A. Well, it was a positive demonstration of the fact that there was circulation of air in that engine room.

Q. Well, specifically how was that fact demonstrated to you?

A. By the movement of the smoke.

Q. How did the smoke move?

A. It moved away, of course, from the air that was blown in and towards the air that was drawn out.

Q. Did the exhaust system that you had in operation draw the smoke from the engine room?

A. It did, yes.

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Q. In your opinion was the system of ventilation adequate to operate on the pilot boat New Jersey?

A. It was.

Q. For what purpose was that ventilation system constructed, within your experience?

A. It was constructed for the purpose of making the engine room a comfortable place for the engine room crew to work.

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DEFENDANTS' MOTIONS AT CLOSE OF PLAINTIFF'S CASE AND ACTION THEREON

Mr. Mahoney: The defendant further moves that the action be dismissed on the specific ground that the plaintiff has shown no right to relief. He has established no causal connection between any act of the defendant and the decedent's death.

[fol. 42] Insofar as the negligence cause of action is concerned, he has failed to establish control or a duty on the part of the defendant.

Insofar as the seaworthiness cause of action, he has failed to establish that the defendant failed to supply reasonably adequate equipment.

In addition, the defendant moves for a directed verdict on the same ground and on the further ground that there is no genuine issue of fact for the jury's consideration.

The Court: The motion with respect to the negligence claim is denied.

Your other motion was with respect to the claim of unseaworthiness. What is the basis of the motion there?

Mr. Mahoney: As I stated, the defendant's motion to dismiss the claim of unseaworthiness is based on the position that the plaintiff has not established that the defendant failed in any way to supply reasonably adequate equipment.

The Court: Isn't that a question of fact particularly in view of the testimony given by the witness Gaines that in his opinion the ventilation system was inadequate?

Mr. Mahoney: I respectfully point out that Dr. Gaines' testimony was admittedly based upon inadequate information and upon speculative grounds.

The Court: Well, that is a question of fact for the jury to pass upon and you developed, in part, that there were certain factors that had to be taken into account.

On the other hand, in answer to a very full hypothetical question based upon conditions as related during the course of the testimony of other witnesses he specifically stated that in his opinion it was inadequate. Whether or not it was is a question to be passed upon by the jury.

Mr. Mahoney: I respectfully except.

[fol. 43]

DEFENDANTS' MOTION AT THE CLOSE OF THE EVIDENCE AND ACTION THEREON

Mr. Mahoney: The defendant at this time renews the motion for a directed verdict on the ground that there has been a complete failure of proof in establishing either that the defendant showed lack of care in any regard insofar as the negligence cause of action is concerned, and, moreover, that there has been no testimony based on factual evidence that the defendant failed to supply the decedent with a safe place in which to work.

The Court: * * * I hold there is a question of fact for the jury to pass upon. Your motion is denied.

Mr. Mahoney: I respectfully except.

DEFENDANTS' REQUESTS TO CHARGE

1. The decedent, as an electrician employed by an independent contractor, was not entitled to the warranty of seaworthiness.

4. Where the testimony permits more than one inference, the jury cannot speculate and the party having the burden of proof must lose.

7. If it is found that the defendant was negligent and if it is found that the decedent was contributorily negligent, such contributory negligence is a complete bar to recovery by the plaintiff.

[fol. 44]

CHARGE OF THE COURT

The Court: Ladies and Gentlemen of the Jury: At the time of your original selection as jurors, I told you that your principal function during the progress of the trial would be to listen carefully to the evidence and observe the witnesses as they testify. It has been evident to me that you have followed the testimony in the case with keen interest and that you have a full grasp of the facts that are in the case. At this time you are about to enter upon your final function as jurors, and that is to pass upon the fact issues that are in the case.

You are the sole and exclusive judges of the facts. You pass upon the weight of the evidence. You determine the credibility of the witnesses and you resolve such differences as there may be in the evidence.

You are required to accept my instructions as to the law and to apply them to the facts as you may find them. In your determination of the facts, you rely upon your own recollection of the evidence. What I have said from

time to time during the progress of the trial, what I may say during the course of these instructions with reference to the facts, whatever counsel may have said during the trial or during the course of their summations, as to the facts, are in no respect binding upon you and are not to be taken by you in place of your own recollection of the evidence.

Before we consider the law that is applicable to the case proper, I think it is desirable to emphasize a matter to which I referred when you were first selected as jurors. The fact that this action is brought to recover damages for the benefit of the widow and the children of the decedent, must play no part in your consideration or deliberations. However much we may sympathize with them because of the loss of a dear one, the plaintiff in this action may not recover unless, just as every other plaintiff in a civil case, she meets the burden of proof which the law [fol. 45] casts upon her, as I shall outline it to you in these instructions, and I am sure that the plaintiff would not have it otherwise.

You play a most important role in the administration of justice. Justice cannot prevail if sympathy, prejudice or bias enter into your deliberations. If they do, you no longer render justice. Your oath of office is to render justice fairly and impartially, without fear or favor, and solely upon the evidence in the case. And I have no doubt that each one of you will fully live up to your oath of office.

The plaintiff seeks to hold the defendant, the United New York & New Jersey Sandy Hook Pilots Association, which I shall refer to hereafter as either the Association or the defendant, liable for the damages occasioned by his death, upon the ground that the Association, as owner of the vessel New Jersey, violated certain duties which it owed to Walter Halecki, as one who worked upon its ship. Halecki, as you know, was not an employee of the Pilots Association. The Association had engaged the Rodermond Corporation to do certain repair work on the New Jersey, and in turn, Rodermond subcontracted the electrical repair and cleaning work in the engine room of the ship to the K & S Electric Company, by whom Halecki was employed.

The plaintiff contends that the defendant is liable upon either one of two alternative theories. The first ground of recovery which the plaintiff advances is that Halecki, in repairing and cleaning the generator, was performing a task in the ship's service usually done by a crew member, and therefore the defendant owed him the duty to supply a seaworthy vessel. The second ground is that, as an invitee upon the ship to do the job as specified in the repair order, the defendant owed him a duty to supply a reasonably safe place in which to work.

Since these alternative theories involve different concepts of law, although in end result the basic responsibility [fol. 46] may appear to merge, we will consider each claim separately.

The first theory is based upon a historic doctrine of the sea known as the warranty of seaworthiness. This imposes upon the owner of the vessel the duty to supply crew members with a seaworthy vessel—that is, one reasonably fit for the purposes for which she was being used. This warranty of seaworthiness is not limited to the ship proper. It extends to and includes all equipment, machinery and appurtenances. Thus, the owner of a ship is under a duty to supply and keep in good order and condition proper appliances and equipment reasonably adequate and sufficient for the work to be performed, and this would include an adequate ventilating system. This means that the ventilating system must be reasonably fit for its intended use, and if not, the vessel is unseaworthy.

Halecki, as an electrician engaged in cleaning the generators, was performing a function usually carried out by a ship's crew. Under this circumstance, the law imposes upon the defendant, the Association, the same duty it owed to its regular crew members—that is, to supply Halecki with a seaworthy vessel.

Incidentally, the fact that Halecki was an employee of the K & S Electric Company does not affect the duty owed to him by the defendant Association. Its duty was non-delegable—that is, it could not be delegated to or transferred to anyone else, and it existed without regard to whatever duty Halecki's own employer or anybody else owed to him.

The shipowner's absolute and non-delegable duty to supply a vessel and appliances adequate for the work to be performed, existed regardless of whether or not defendant had control over the vessel or its appliances. This absolute duty is imposed upon the defendant, whether or not it knew of the defective equipment or inadequacy [fol. 47] or insufficiency of the appliances, should such be the fact.

If as a result of the unseaworthiness of the vessel a crew member or one engaged in performing a crew member's work is injured, then the owner of the ship is held absolutely liable, even though it was without fault. In other words, even the exercise of reasonable care does not relieve the shipowner of its obligation to furnish a seaworthy vessel and reasonably adequate equipment and appliances.

This concept, under the first claim, as you will soon see, is quite different from that involved in the plaintiff's alternative or second theory.

The essence of the plaintiff's first claim is that carbon tetrachloride, which was specified in the repair order for the cleaning of the generators of the engine room, was a known dangerous substance; that in order for men to work in safety, it was necessary to have an effective ventilation system to remove the fumes; that the ship's ventilating system, as supplemented by the exhaust blower, the air hose and other equipment, was inadequate for the use for which it was intended—that is, to remove the carbon tetrachloride fumes so as to render the engine room a reasonably safe area in which to work. This is the substance of the plaintiff's claim that the vessel was unseaworthy.

The defendant denies the plaintiff's charges. It affirmatively contends that the ship's ventilating system, with the auxiliary items, was reasonably adequate. The burden of proof that it was not reasonably adequate for its intended use is upon the plaintiff, and this she must show by a fair preponderance of the evidence, which I shall presently define.

The mere fact that you should find, if you do so find, that Halecki was poisoned by inhaling carbon tetrachloride in the engine room and died as a result thereof, does not

establish the plaintiff's claim. Indeed, it is conceded in [fol. 48] this case, as I understand the defense, that he did in fact die of carbon tetrachloride inhalation. But this does not prove the plaintiff's claim. The defendant was not an insurer of the plaintiff's safety and it is not liable for any and all injury to those working on the ship. It may only be held liable upon proof that the vessel was in fact unseaworthy.

The warranty of seaworthiness does not require the best possible equipment. Whether or not a vessel is seaworthy and its appliances adequate depends upon time, place and circumstance.

Here the New Jersey was undergoing repairs. The basic question is whether, under all the circumstances, the ventilating system was reasonably fit for the use for which it was intended, and here where I refer to "ventilating system" I am sure that you understand I am also including the auxiliary parts which were brought into the engine room.

I have said that to succeed, the plaintiff has the burden of sustaining her charges by what the law terms a fair preponderance of the evidence, and this is a burden that she has with respect to both claims, seaworthiness and negligence. What do we mean by "fair preponderance of the evidence"? It means the greater weight of the evidence, the quality of the evidence, rather than the number of witnesses. It means that the testimony on the part of the party who has the burden of proof is more persuasive and convincing than that opposed to it.

You may say that a fact is proved by a fair preponderance of the evidence when all of the evidence tends to persuade you the witness or witnesses are telling the truth. Sometimes, in order to make this definition more real, I give an illustration which I think will bring home to you just what is meant by fair preponderance of the evidence. Assume that you are in your deliberations in [fol. 49] the juryroom and are reviewing the evidence given by the various witnesses. When an item of evidence appeals to you as credible and believable and supports the plaintiff's side of the case, you will assume a hypothecary scale before you and you will put that evidence on the plaintiff's

side of the scale. And you do the same thing with the evidence which appeals to you as supporting the defendant's side of the case. And you do this until you have concluded a review of all the evidence.

If, upon the conclusion of your analysis of all the evidence, the plaintiff's side of the scale is weighted in her favor, no matter how slightly, then she has sustained her burden of proof. If, on the other hand, the scales are balanced or even, then she has failed to sustain her burden of proof, and, obviously, if the scale is weighted on the defendant's side, again she has failed to sustain her burden of proof.

The plaintiff, to sustain her burden of proof that the ventilating system was not fit for its intended use and purpose, relies in large measure upon the testimony of Robert Gaines, the toxicologist, who was called as an expert witness. Gaines in substance testified that an acceptable safe concentration of carbon tetrachloride is 100 parts per million; further, that the chemical can be used with safety if there is proper ventilation by exhaust to remove the fumes.

He also testified that in his opinion the average concentration of carbon tetrachloride in a room the size of the engine room of the New Jersey was 20,000 parts per million, but that this was the maximum which did not take into account the ventilating system and its various adjuncts; that the true concentration depended upon the effectiveness of the ventilation system in removing the fumes; further, that in order to reduce the working area to a safe condition, it would be necessary to remove 850 cubic feet of air per minute.

[fol. 50] In answer to a hypothetical question which set forth the various units of the ventilating system and in general the conditions prevailing in the engine room, Gaines gave it as his opinion that because of the way the ventilating units were located, they were inadequate to reduce the concentration to the maximum acceptable standard of 100 parts per million. And again, in his opinion, the ventilating system, with its auxiliary equipment, was not reasonably adequate to remove the fumes for men to work in safety.

The defendant, in resisting plaintiff's claim, stresses that it was not required to supply the most perfect equipment, but only equipment reasonably fit for the use for which it was intended. To establish that it met its duty, the defendant points not only to Doidge's testimony that the ventilating system in his opinion was entirely adequate for men to work, and that it functioned properly, but that Halecki himself assisted in setting up part of the ventilating system; that at no time did he complain of its inadequacy or mention the subject, although he knew of the nature of carbon tetrachloride.

The defendant further contends that the plaintiff was poisoned as a result of a predisposition to carbon tetrachloride poisoning because of his daily consumption of liquor and beer in stated quantities for some time preceding the day he worked in the engine room of the ship; that such predisposition was an unusual situation which in no way detracts from the fact that the ventilating system, under normal circumstances and for the average person who might be working there, was reasonably adequate for its intended use.

In addition the defendant also called as an expert witness Dr. Helpern, the toxicologist, or the medical examiner. He testified in substance that the consumption of liquor and beer in the stated quantities predisposed one to carbon [fol. 51] tetrachloride poisoning and that an average individual who did not indulge would likely be free from the effects of poisoning under the same conditions, and that in his opinion, decedent, by reason of his drinking, did have such a predisposition and susceptibility.

The defendant also relies upon the testimony of Finkenaar, a ship surveyor and engineer, who, after making tests of the engine room, expressed his opinion that the ventilating system with the auxiliary equipment used on September 29, 1951, could effect a complete change of air in one minute; that the addition of supplementary equipment would improve the efficiency of the ventilating system beyond that status—that is, removing it in one minute, causing a complete turnover in less than one minute. He admitted that in and of itself the ship's ventilating system would not be sufficient to remove the carbon

tetrachloride, that it needed the addition of other ventilating aids or units, and of course, the defendant's contention is that the combination of the ship's basic ventilating equipment, as buttressed by the various exhausts, air hoses and the like, did result in efficient ventilation so as to remove the fumes and to make the engine room a reasonably safe place in which to work.

And finally it counters the testimony of Dr. Gaines by emphasizing that Doidge was there and knew the actual conditions, whereas Gaines was conjecturing an opinion. In effect it contends that Doidge, as a practical man, knew conditions and he was satisfied that the ventilating equipment was reasonably adequate and functioning properly.

If, upon all the evidence, you find that the plaintiff has sustained her burden of proof that the ventilating system was not reasonably fit and adequate to eliminate the fumes so as to permit men working in the engine room to do their jobs with reasonable safety, then she is entitled to recover. And if you do so find, there would be no need [fol. 52] to consider plaintiff's alternative theory upon which she seeks to hold the defendant liable.

On the other hand, if she fails and you find the ventilating system was adequate and functioning properly, of course she is not entitled to recover on the first claim—that is, upon the claim of unseaworthiness. However, plaintiff contends that in any event she is entitled to recover upon the second or alternative theory. This second theory involves, as I have already mentioned, different elements of law. The decedent Halecki as an employee of the K & S Electric Company, of course had to enter the engine room to do his job. Under such circumstances, the law implies that the defendant association, as the owner of the ship on which the work was to be done, invited him there for that purpose. The defendant, as the owner of the ship, apart from its duty to supply a seaworthy vessel, then also owed to Halecki and to his fellow employees as such invitees, the duty to use reasonable care to see that the engine room was a reasonably safe place in which to perform their work.

Incidentally, in this instance too the fact that Halecki was an employee of the K & S Electric Company does not

affect the duty of the defendant to supply a reasonably safe place to work to invitees. Again the defendant's duty was non-delegable and it persisted despite any concurrent duty which Halecki's employer or the shipyard may have owed to him.

The plaintiff contends that the defendant violated this duty, that it was negligent. You will note that under the first claim that of unseaworthiness, it mattered not whether the defendant exercised reasonable care, or whether it knew or did not know the ventilating system was adequate. Under that claim it is the fact of inadequacy or lack of fitness, if you do so find, that is crucial. But under the alternative claim, which we are now considering, the crucial question is whether the defendant was negligent.

[fol. 53] This brings us to the question: What do we mean by negligence? It is the failure to use ordinary and reasonable care under a given set of circumstances.

Negligence is doing that which a reasonably prudent person would not have done, or failing to do that which a reasonable person would have done under all the circumstances of a given situation. The defendant denies that it was negligent and further contends that the decedent himself was solely responsible for events, and if so, this would bar any recovery by the plaintiff, and it further contends, if not solely responsible, then Halecki, by his own conduct, contributed to his death, in which event this would go in reduction of damages, as to which I shall further instruct you when I consider the question of damages.

With regard to the second claim—that is, of negligence—again the mere fact that the decedent was poisoned by carbon tetrachloride and died in consequence does not in and of itself establish that the defendant was liable. Again, the shipowner is not an insurer of the decedent's safety. Its liability depends upon proof of negligence, the burden of which rests upon the plaintiff. Under either theory, plaintiff must establish that the decedent's death was the proximate result, either of the defendant's negligence or the alleged unseaworthiness of the vessel.

What do we mean by "proximate cause"? It is a cause which naturally led to and might have been expected to produce the result it did. Proximate cause is the effective producing cause of a claimed injury or death.

As I said sometime back in this case, there does not appear to be any question but that the decedent died of carbon tetrachloride poisoning. To establish the claim of negligence, the plaintiff, in large measure, depends upon the same evidence as that offered to support the charge of unseaworthiness. In addition she claims that the defendant's chief officer and other officers knew that Halecki [fol. 54] and Doidge were going to work in the engine room on Saturday, September 29th; that the officers of the ship knew that the use of carbon tetrachloride was dangerous; that even assuming the ventilating system was adequate at the start of the day's work, reasonable conduct required the ship's officers to have checked from time to time to make sure that it was adequate and functioning properly while the men were working there; that in the exercise of reasonable care, they either knew or should have known that the auxiliary equipment, placed as they were in the engine room, would not be adequate to remove the fumes; that it was not prudent conduct to rely upon Doidge or the employer, K & S Electric Company. The plaintiff points to the testimony of Captain Haley—that is the testimony which was read from the deposition yesterday—that while the vessel was undergoing repairs, it was under the jurisdiction of him and the marine superintendent of the defendant, and if there were any unsafe conditions aboard the vessel, it would be up to either of them to see that such conditions were corrected.

Under this circumstance, plaintiff contends that the defendant should have known of unsafe conditions and taken appropriate steps to correct them. The defendant, in resisting this claim, again states it acted as any reasonably prudent person would have under all the circumstances.

You ask yourselves, did the defendant through its officers, act as the ordinary and reasonably prudent person would have in discharging its duty to provide a reasonably safe place for the decedent to work in? In not making a further check when they knew that Doidge had added to the ventilating system?

The defendant, as you know, contends the system, as augmented by the exhaust blower, air hoses and the like,

was adequate certainly for the average man without any predisposition to poisoning.

[fol. 55] In deciding whether the defendant acted in a reasonably careful manner, you may take into account the decedent's prior health and predisposition to carbon tetrachloride poisoning, if in fact you find he was so predisposed. You ask yourselves, was it reasonably foreseeable that one of the men working in the engine room would, because of his habits, show a predisposition to such poisoning? Should the defendant, in the exercise of reasonable care, have known this?

In other words, if you find that with respect to the average worker, one might expect in that kind of job and in that engine room, the ventilation system was adequate, then simply because one individual is prone to poisoning, and this is unusual, it would not mean that the defendant failed to act as a reasonably prudent person.

You ask yourselves whether under all the circumstances the defendant exercised reasonable care to supply an adequate ventilating system and to see that it functioned properly so that the engine room was a reasonably safe place in which to work.

If you find that the ventilating system, either upon installation or after it commenced to function, was inadequate to withdraw the fumes and resulted in creating an unsafe and dangerous condition for men working there, and further find that the defendant knew or, in the exercise of reasonable care, should have known this, and failed to cause the condition to be corrected by the contractor or itself failed to correct the condition, then you have sufficient upon which to find the defendant negligent.

If you find that the defendant was negligent and that such negligence was the proximate cause or one of the contributing causes of the death of the deceased, if there was also concurrent negligence on the part of Halecki's employer, the K & S Electric Company, that will not absolve the defendant from responsibility for its own acts of negligence.

[fol. 56] I mentioned a moment ago that in deciding whether the defendant acted in a reasonably careful manner, you may take into account, in deciding that issue, the

decedent's prior health and predisposition to carbon tetrachloride poisoning. However, if you decide or should find that the defendant was negligent or that the vessel was unseaworthy, and this was the proximate cause of Halecki's death, then the defendant is liable to respond in damages even though the deceased had a predisposition to carbon tetrachloride poisoning and the defendant was without knowledge of this fact. In other words, once you find, upon all the evidence, that there was negligence or unseaworthiness, the fact that he had a predisposition would make no difference because a man's health is taken in whatever state it is.

You (sic) determination of the issues in this case in some measure will depend upon how you appraise the testimony of experts. Just as laymen frequently disagree as to matters within their observation, even without intending to state untruths, so experts frequently are in disagreement in their judgments as to matters within their professional competence. How do you evaluate the testimony of witnesses, lay and expert? In your search for the truth you use your everyday common sense. As I say to jurors so often, when you walk into the door of the courtroom and sit in the jury box and listen to evidence and then go into the jury room and deliberate, you do it with your common sense with you at all times. You don't leave it outside the door of the courtroom.

You have seen the witnesses and have observed their manner of giving testimony. How did the story impress you? Did the witness appear to be truthful, candid and fair? Did he appear forthright? Did his judgment, if he is a professional witness—that is, an expert witness, on professional matters, carry the stamp of knowledge and experience and did his judgment appear sound?

[fol. 57] In other words, in determining the credibility of witnesses; you apply your everyday common sense and experience and act precisely as you would in determining an important matter in your own daily lives where you are called upon to act upon the basis of whether or not you are receiving accurate and truthful information.

If upon all the evidence you find that the plaintiff has sustained her burden of proof, that the vessel was un-

seaworthy or that the defendant was negligent, then and only then do you reach the question of damages. Of course, if she has failed, that would end the case and you do not consider the question of damages at all.

Incidentally, the fact that I charge you on damages does not mean that the Court entertains any view as to how you are to decide the case. That, as I have mentioned a number of times, is exclusively your function.

There are two separate claims for damage to be considered. One is under the Death Act of the State of New Jersey. I suppose some of you wonder why it is under the State of New Jersey. We apply New Jersey law because the decedent was a resident of New Jersey at the time of his death. So that law is applied even though the case is being tried here in the Federal Court.

Under that act, the plaintiff seeks to recover damages for the pecuniary loss which the widow and the three children who were dependent upon Halecki, have suffered by reason of his death. Under that law, the widow and her three children are entitled to recover for the deprivation of the reasonable expectancy of contributions of a pecuniary nature, and the probable loss of direct services in and about the home. This includes the loss of any services having a pecuniary value which the deceased might have rendered to his wife and the three children, had he lived. You are not to include any award by way of compensation for their grief and sorrow, occasioned by their [fol. 58] bereavement, however sympathetic you may feel towards them, and obviously no award of damages under the circumstances would be sufficient to compensate a family for the loss of a dear one.

In considering the pecuniary or the monetary loss, you consider Halecki's normal income and the amount which he contributed in the past for their support. You may take into account the state of his health, his work habits, and life expectancy, and the likelihood that he would have continued to work during the period or the greater period of his life expectancy. You may consider that his earnings would not necessarily be constant. The deceased's prospects of advancement or increased earnings may also be taken into account.

Halecki was 40 years of age when he died. His widow was 36 years, and the three children were then respectively 14, 11 and 5 years of age. The testimony in the case is that in 1950, Halecki earned almost \$3400; that in 1951, up to the date of his death, he earned \$3250. These earnings were based upon a \$2 per hour rate for an electrician, and it was stipulated the present rate on his job is \$2.40 per hour. I believe counsel in his summation made a reference to \$2.60. My own recollection is \$2.40.

Mr. Mahoney: I think 2.60 is correct.

Mr. Baker: 2.60.

The Court: Then I stand corrected.

Mrs. Halecki testified that Mr. Halecki turned over his entire pay for the support of the family, that she gave him about seven or eight dollars per week for carfares and incidentals, that he spent about sixty or seventy dollars per year for his clothing. You also have a right to take into account the value of his board and lodging as a member of the family, in determining what the net contribution was that he made to the family. In any event, the plaintiff claims that the net amount retained for the support of the family was approximately \$3000 per year.

[fol. 59] First you must determine the reasonable, likely future earnings of the decedent and the contributions which he would have made to his wife and three children for their support had he lived. Once you determine the likely annual contribution to the wife and dependents, and the period thereof, the pecuniary loss so sustained must be reduced to its present value.

This is a matter of computation depending upon the rate of interest you apply. It is in effect capitalizing at a reasonable rate of interest that sum which would yield annually the same income or support which the wife and the dependent children would reasonably have been expected to receive from the decedent. In other words, you must also contemplate exhausting the fund in full. You don't figure a capital sum to yield a fixed annual income, because the fund must be exhausted in its entirety at the end of the period which you estimate that the widow and dependent children would have received income.

To assist you in this computation, the plaintiff has produced the testimony of an actuary. Parenthetically, I should add that I granted a motion to strike all his testimony which related to annuity rates based upon the life of the husband alone, and the only figures which you are to consider, if you do decide to consider them, are those based upon the joint lives of the husband and wife. The actuary testified that the present value of an annuity of one dollar, based upon the joint life expectancy of the decedent and his wife, at 3 per cent, is \$16.72, and at 4 per cent, it is \$14.82.

Simply by way of example—and please understand that this is only by way of example—assume that you find that the amount of contribution would have been at the rate of \$3000 per year. You multiply that annual sum by the annuity rate, whether 3 or 4 per cent, or such rate as you believe might be considered under present conditions a fair rate of return, without requiring more than an average skill in investing.

[fol. 60] Using the \$3000 annual contribution as an example and a 3 per cent rate, you would multiply the annual amount, annual sum by \$16.72, and that would give you a total of \$41,800. That would represent the present value of the damages.

Again, using the theoretical \$3500 sum and 3 per cent interest, you would multiply the \$3500 by 16.72, and that would give you \$58,520.

Or, if you decide to use the 4 per cent rate, then you would multiply, in the instance of \$3000, or \$3500, whichever you decide the annual contribution to be, by \$14.82 which would give you \$37,050, in one instance, and \$51,870 in the other.

In other words, using multiples of \$2500, \$3000 and \$3500, and a 3 per cent or 4 per cent interest rate, based upon the joint expectancy of the decedent and his wife, there is a range of present value of pecuniary damage, depending upon the annual contribution and the rate of interest you use, of from \$37,050 to \$58,520.

These were various examples placed upon the blackboard by the actuary yesterday. However, you are not bound to use any of these figures or rates. You decide for your-

selves whatever you determine to be the loss of annual contribution, and act accordingly. You compute the damages and you determine its present value, and I am sure it is clear to you that you do not have to find a precise dollar amount. You reach a conclusion representing a fair amount, applying the standards I have outlined.

Finally, there is the second claim for conscious pain and suffering of the decedent, and here too you must determine what amount, if any, is to be awarded for the conscious pain from September 29 to October 12, 1951, the date of his death. You have had the testimony as to the nature of this illness during this period. In this instance, unlike the claim for the benefit of the dependents, there is no yardstick really to guide you except your good common sense and your judgment. Again, sympathy must not be substituted for reason and common sense. The purpose of the law is to award just and fair compensation. Your award must be neither excessive nor inadequate. It must be fair and reasonable.

When you have reached a conclusion as to the amount of pecuniary damage, and also, for conscious pain and suffering, your work is not concluded. The defendant in this case, as I mentioned earlier in these instructions, has raised the defense of contributory negligence. Contributory negligence on the part of Halecki, the decedent, has been raised as an issue. In other words, the defendant claims that should you find that it was negligent or that its vessel was unseaworthy, then the decedent, by his own conduct, contributed in part to the events that led to his death. If this is so, and the defendant should succeed in sustaining its defense, then the defendant is entitled to a reduction of the damages in each award to the extent that you find the decedent contributed to his own death. Halecki was under a duty to exercise reasonable care for his own safety, and a failure to do so was contributory negligence.

Simply stated, contributory negligence is the doing of some act or an omission to do some act amounting to a want of ordinary care for his own safety. The basic contention here is that Halecki assisted in setting up the ventilating system, and if it proved inadequate and ineffective

for the purpose for which it was intended, he was present, was aware of conditions, and in some measure was responsible therefor. If you find, in fact, that the decedent was contributorily negligent, then you determine to what percentage or extent he was negligent. In other words, if you find he contributed 50 per cent or a greater or lesser percent, you will deduct that amount from the damages to be awarded under the two claims to which I have referred.

[fol. 62] Incidentally, this rule is quite unlike the rule that prevails in the State Court, and some of you may have sat in cases in the State Court where the defense of contributory negligence bars a recovery by the plaintiff entirely. This rule is not applied in this type of case. It is called the rule of comparative negligence.

Since the defendant sets up the defense of contributory negligence, the burden of establishing it is upon the defendant, and this it must do by a fair preponderance of the evidence. If it succeeds, it is entitled to a reduction to the extent of decedent's own negligence. And of course, if it fails, no reduction is to be made.

In discussing in summary fashion the evidence and the contentions of the parties, I have of necessity omitted substantial portions of the testimony offered by both sides. My failure to touch upon other evidence in the case or to mention all the evidence is no indication that such other evidence is not important. Nor does the mention of particular testimony in these instructions indicate that it is of greater importance than that not mentioned. All evidence in the case is important and it is your duty to review fully all evidence in reaching a conclusion on the issues that you are called upon to consider. My purpose in making reference to the testimony was to set up in broad outline the various contentions of the parties so as to bring the issues within proper focus.

I have already told you—and I am emphasizing it now—if your recollection of the evidence differs from any reference that I have made to testimony, you are to rely entirely upon your own recollection, and to have no hesitancy in rejecting such references I have made and which do not accord with your own recollection.

I believe I have also mentioned this during the course of the trial when I asked questions of witnesses. The Judge has the right and indeed a duty to see that facts are clearly presented, and the purpose was to clarify matters in the [fol. 63] case. However, you are not to draw any conclusion that by reason of my interrogation of witnesses, I have any point of view as to that witness's credibility or how the case is to be decided. That is your function, and as I said at the outset of the charge, you are the exclusive judges of the facts, and none may invade your province.

Under your oath you are sworn to try this case in accordance with the law and the evidence, and to render a true verdict accordingly. You should not be motivated by sympathy or by prejudice. You should not be concerned—and I am sure you will not be concerned—with who are the plaintiffs or who is the defendant. All stand equal before the bar of justice. Your duty is to resolve the issues fairly and impartially. You came into the jurybox without any preconceived views, ideas or opinions concerning the right or wrong of either party, and what you now know about it should have been learned only from the witness stand and from the exhibits in the case. Your final determination of the facts must be based upon the evidence.

Each of you is entitled to his or her own opinion, but you are required to exchange views with your fellow jurors. That obviously is the purpose of jury deliberation, to review the evidence and analyze it, discuss it and reach an accord, if you can do so without violence to your own conscientious judgment, as to how the case should be decided. However, if you have a point of view that differs from that of your fellow jurors, and if upon discussion you are persuaded that your point of view is erroneous, you should have no hesitancy in changing your point of view. But you should do this only if you are conscientiously satisfied that the verdict requested is in accordance with your view of the evidence and the law in the case.

To report a verdict, it must be unanimous.

I have prepared a form of special verdict which I will hand to the foreman of the jury; and in the event you find [fol. 64] for the plaintiff, it sets forth, "Please answer the following." That is, in the event you find for the plaintiff:

"1. We find the damages:

"(a) In the claim for pecuniary loss to the widow and dependent children to be in the sum of," and the amount is blank. You fill in whatever amount it is.

"(b) In the claim for conscious pain and suffering to the decedent to be in the sum of," and there is a blank.

Should you, during the course of your deliberations, require any of the exhibits, if you send a note out, we will be glad to send them in to you. I think you should still remain in the box. There may be matters counsel may want to discuss. Please do not deliberate. Do counsel want to see the Court?

Mr. Mahoney: Your Honor, there are certain matters I would like to discuss.

The Court: All right, we will see you inside then.

(The following discussion took place in chambers out of the hearing of the jury.)

The Court: Counsel for the plaintiffs, any exceptions?

Mr. Baker: No exceptions.

The Court: Counsel for the defendant?

DEFENDANTS' REQUESTS TO CHARGE

Mr. Mahoney: Your Honor, defendant requested an apparent inadvertent error be corrected. Defendant requests that. I believe in your Honor's charge you stated that the witness Finkenaaur testified that the ship's ventilating system, with the auxiliary equipment, was capable of changing the air within one minute.

Mr. Baker: No.

[fol. 65] The Court: No, I did not say that.

Mr. Mahoney: You went on—it indicates that is what you meant to say. He said this could be improved by the use of additional equipment.

The Court: No, what I did say is that the rate of changing air would even be improved by the use of auxiliary equipment.

Mr. Mahoney: That's correct, but I believe your first statement was as I stated.

The Court: If you think I made a mistake on that, I will correct it. Just let me find that a moment.

Mr. Baker: My recollection is that that was not so.

The Court: It is nothing to discuss. We will find it immediately.

(Court searches notes.) Well, I think you are right. I did refer to the fact that the ventilating system, with the equipment, could effect a change within one minute. I meant the ship's ventilating system, without the auxiliary. You are right.

Mr. Mahoney: I would appreciate if you would make that change.

The Court: I don't know how it escaped me.

Mr. Mahoney: Your Honor, defendant further requests, in accordance with your earlier informal ruling, that the jury be charged that the defendant's failure to warn—I am sorry—that the defendant had no obligation to warn the plaintiff of the dangerous characteristics of the substance, in view of the decedent's experience with the commodity.

The Court: Well, I mentioned that not only in informal discussions, but in a statement on the record when I indicated to plaintiff that I would refuse to instruct the jury that there was any duty to warn. I think I also indicated to you I do not see any purpose in instructing the jury on that. They do not know anything about warning. If you press it, I will give it to them, but are you not really complicating something? They know nothing about a duty to warn concerning the nature of carbon tetrachloride.

Mr. Mahoney: Well, I request that you so charge, your Honor.

The Court: I will give it to them. It does not make any difference.

Mr. Mahoney: The defendant further requests—

The Court: Wait, let me get that down. Go ahead.

Mr. Mahoney: The defendant further requests that it be emphasized to the jury that instructions on computation of damages, together with the form for a special verdict, be no indication that damages are to be considered.

The Court: Well, I have already instructed the jury on that once and I am not going to emphasize any one part of the charge as against any other.

EXCEPTIONS TO THE CHARGE

Mr. Mahoney: And defendant respectfully excepts to your Honor's charge to the effect that the plaintiff was entitled to a seaworthy vessel, and defendant respectfully excepts to your Honor's charge that contributory negligence is not the rule to be applied here, in accordance with our prior requests of charge.

The Court: I asked you to give me authority on that to overcome the Pope and Talbott case. I asked you to give me that several days ago. You have not given it to me yet, and the decision will stand.

Mr. Mahoney: Do you want authority on the record?

The Court: No.

Mr. Baker: May I ask one point for clarification, with respect to the question of damages? I leave it to your Honor, in your discretion, to determine what should be done. In giving the jury the tables that your Honor indicated the jury has a right to consider in arriving at a [fol. 67] verdict, those tables only covered the contributions, the wage contributions. Do you think, for the purpose of clarification, you should indicate that that does not include any additional amount that they may find he is entitled to?

The Court: You don't mean for the purpose of clarification, you mean for the purpose of emphasis, and I refuse to do it.

Mr. Baker: I mean simply—

The Court: No, I refuse to do that.

Mr. Baker: I think it was for contributions only.

Mr. Mahoney: Your Honor, for the purpose of the record, may I register objections to certain parts of counsel's summation?

The Court: No, you may definitely not do that at this point. Counsel concluded his summation at 11.45. There was a recess of fifteen minutes before the Court began its instructions to the jury. The Court commenced its charge at 12 o'clock. It is exactly 1 o'clock now, and not a single word has been said up to this moment.

(End of discussion in chambers out of the hearing of the jury and the proceedings were resumed in open court as follows):

The Court: Members of the jury, while I did tell you several times that if I made a reference to testimony that did not accord with the record or your own recollection, of course you will disregard it, counsel has called my attention to a statement I made in the charge which I agree with is incorrect, and I don't know how this clause slipped in there. I am going to correct the statement. It is a statement with respect to the testimony (sic) given by Finkenaur, the ship surveyor. My original statement was that the defendant also relies upon the testimony of Finkenaur, a ship's surveyor and engineer who, after making a test of the engine room, expressed his opinion that the ventilating system, with the auxiliary equipment used on September [fol. 68] 29, 1951, could effect a complete change of air in one minute.

Well, that statement is incorrect in so far as I included the reference "with the auxiliary equipment." His testimony was that the ship's ventilating system, the permanent ventilating system, could effect a change of air in one minute, and, as a matter of fact, the next clause would indicate that that is what I had in mind because he further testified that if you added further ventilating equipment to it, such as was brought in, that would cause an even more efficient turnover of air and cause a complete turnover of air in less than one minute. So I am glad to correct that statement without relying upon you to correct it for me.

There is just one other item I am going to mention. The evidence in this case establishes that the decedent, as well as Doidge and everybody, knew that carbon tetrachloride was a dangerous substance. Under this circumstance, I charge you that the defendant was under no duty to notify Halecki that it was dangerous, since he already knew it.

Does that meet your requirement?

Mr. Mahoney: Thank you, your Honor.

The Court: All right.

I tell you what we are going to do. Ernest, you follow my usual rule that you eliminate from the oath that they are to be kept without food and drink. The oath that is given is a very ancient one going back—some day we will trace how far back it goes, but maybe four or five hundred

years, and generally—you may have heard it administered in other courts, but I am rather strict about it. It is to the effect that you shall keep the jury without food and drink until a verdict they do reach. Then sometimes we allow them to have some liquid inside, of only one kind, and even then sometimes we send them out for food, as we are about to do now, because I think you ought to have your lunch first and start in a very relaxed way. It is an important [fol. 69] case to the plaintiff and it is an important case to the defendant. And I think everybody will be much better off if you have your lunch first and then come back to deliberate.

(Marshals sworn.)

(At 1.10 o'clock p.b. (sic) the jury went to lunch and returned to deliberate at 2.10 o'clock p.m.)

(At 4.07 o'clock p.m. the following took place):

(Roll call of the jurors.)

The Clerk: Madam Forelady, have you reached a verdict?

The Forelady: Yes, we did.

The Clerk: How do you find?

VERDICT

The Forelady: For the plaintiff. Do I have to read it?

The Court: Yes, read it.

The Forelady: Okay.

"Question: In the event you find for the plaintiff, please answer the following."

Yes, we find the damages in the claim for the pecuniary loss to the widow and dependent children to be in the sum of \$62,500; in the claim for conscious pain and suffering to the decedent, to be in the sum of \$2500.

The Clerk: Thank you. Please be seated.

Ladies and gentlemen of the jury, listen to your verdict as it stands recorded in this case now on trial. You say you find a verdict for the plaintiff as follows: In the claim for pecuniary loss to the widow and dependent children,

to be in the sum of \$62,500, and in the claim for conscious [fol. 70] pain and suffering to the decedent, to be in the sum of \$2,500; total amount, \$65,000, and so say you all?

(Jury nods assent.)

The Court: Any motions?

**DEFENDANTS' MOTIONS AFTER VERDICT
AND DENIAL THEREOF**

Mr. Mahopey: Your Honor, defendant at this time makes a motion to set aside the verdict, makes a motion for judgment notwithstanding the verdict and in the alternative, a motion for a new trial.

The Court: Motions denied.

Mr. Mahoney: Respectfully except.

[fol. 71]

**IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK**

Civ. 87-269

ANNA HALECKI, administratrix ad Prosequendum of the Estate of **WALTER JOSEPH HALECKI**, deceased, and **ANNA HALECKI**, administratrix of the Estate of **WALTER JOSEPH HALECKI**, deceased, Plaintiff,

v.

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS ASSOCIATION, a corporation and **UNITED NEW YORK SANDY HOOK PILOTS ASSOCIATION**, a corporation, Defendants.

JUDGMENT—January 16, 1957

The above entitled action having come on for trial before Honorable Edward Weinfeld, United States District Judge, on December 28, 1956, January 2, 3 and 4, 1957, and a jury having rendered a verdict for the plaintiff, and

against the defendants, and the following written questions having been submitted to the jury, and having been answered as set forth therein,

In the event you find for the plaintiff please answer the following: "Yes"

1. We find the damages:

(a) In the claim for pecuniary loss to the widow and dependent children to be in the sum of \$62,500.00

[fol. 72] (b) In the claim for conscious pain and suffering to the decedent to be in the sum of \$ 2,500.00

It is Ordered and Adjudged that the plaintiff have judgment against the defendants in the total sum of \$65,000.00 and that the plaintiff recover of the defendants costs to be taxed, and that she have execution therefor.

Dated, New York, N. Y., January 16th 1957.

Edward Weinfeld, U. S. D. J.

Judgment entered January 17th 1957.

Herbert A. Charlson, Clerk.

Costs taxed in favor of plaintiff in sum of \$130.80.

Herbert A. Charlson, Clerk.

1/15/57

[fol. 73]

IN UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

[Title omitted]

NOTICE OF APPEAL—Dated January 29, 1957

Notice is hereby given that United New York and New Jersey Sandy Hook Pilots Association, et al., defendants above named hereby appeal to the United States Court of Appeals for the Second Circuit from an order denying defendants' motion for a new trial; from an order denying defendants' motion for a judgment notwithstanding the verdict and from the verdict of the jury and the final judgment entered thereon in the above entitled cause on the 17th day of January, 1957.

Dated: New York, New York, January 29, 1957.

Dougherty, Ryan & Mahoney, Attorneys for Appellants, Office & P. O. Address, 67 Wall Street, New York 5, New York, WH 4-6490.

[fol. 74] To: Nathan Baker, Esq., Attorney for Plaintiff, Office & P. O. Address, 1 Newark Street, Hoboken, New Jersey, and 401 Broadway (Room 2201), New York City.

[fol. 75] [File endorsement omitted]

APPELLEE'S APPENDIX TO BRIEF—Filed October 31, 1957

[fol. 76] EXCERPT FROM TRANSCRIPT OF TESTIMONY

ANNA HALECKI, the plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Where do you live at the present time?
A. 132 Essex Street.

The Court: Where is that?

The Witness: Jersey City.

Q. Mrs. Halecki, how old are you?

A. I am 41 years old now.

Q. At the time of your husband's death, that is, Walter Joseph Halecki, how old was he at the time?

A. He was 40 years old.

Q. At that time how many children did you have?

A. I had three.

Q. When were you married?

A. I was married January 23, 1937.

Q. You married Walter Halecki, the deceased in this case?

A. That's right.

Q. And you have three children of that marriage?

A. That's right.

Q. What are the names of these children and their ages at the time when the death took place.

A. I have three children. One is a boy and two are girls.

Q. The boy, what is his name?

A. The boy's name is Robert.

Q. How old was he at the time?

A. He was 14 years old.

[fol. 77] Q. How old is he now?

A. He is 19.

Q. The next child.

A. It is a girl. She is 16 years old.

Q. What is her name?

A. Diane.

Q. She is now 16?

A. Yes.

Q. At the time—

A. She was 11 years old.

Q. And the next child?

A. Carol.

Q. How old was she at the time?

A. She was 5 years old.

Q. Do all these children live with you at the present time?

A. Yes.

Q. Did they live with you at the time this happened?

A. Yes.

Q. Did you live with your husband at that time and the children?

A. Yes.

The Court: How old were you at the time of the accident?

The Witness: I was 36 years old.

Mr. Baker: I offer in evidence the appointment of Mrs. Halecki as administratrix.

Mr. Mahoney: No objection.

(Received in evidence as Plaintiff's Exhibit 1.)

Mr. Baker: I offer in evidence the three birth certificates of the three children.

Mr. Mahoney: No objection.

(Received in evidence as Plaintiff's Exhibit 2.)

Q. What type of work was your husband doing before his death?

A. Electrician.

Q. He was an electrician?

A. Yes.

Q. Do you know the name of the company he worked for?

A. K & S.

[fol. 78] Q. K & S Electrical Company?

A. Yes.

Cross examination.

By Mr. Mahoney:

Q. Mrs. Halecki, you don't have any direct knowledge of your own of your husband's work on the pilot boat New Jersey?

A. No.

Q. Mrs. Halecki, at the present time you have an action pending in New Jersey?

Mr. Baker: Just a moment. I object to that. I think

that should be subject to the Court's ruling before the question is put.

The Court: Let me see the papers that you refer to. For the time being I am going to sustain the objection. This may be independent grounds of liability.

Mr. Mahoney: Exception.

The Court: You may offer it for identification.

Q. Mrs. Halecki, I show you these papers—

Mr. Baker: Your Honor, I think it is improper to refer to it. Your Honor has ruled they should be marked for identification and that is what he should do.

The Court: Offer them for identification.

(Marked Defendant's Exhibit A for identification.)

The Court: We are interested in only one question: whether or not the plaintiff will sustain a claim here against this defendant.

[fol. 79] Mr. Mahoney: No further questions.

Mr. Mahoney: I have no further questions.

(Witness excused.)

DONALD DODGE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Mr. Doidge, what is your present occupation?

A. Electrician.

Q. How long have you been an electrician?

A. About 30 years.

Q. In September of 1951 by whom were you employed?

A. By the K & S Electric Company.

Q. Who is the boss of that company?

A. Mr. George Kuntz.

Q. Now, what was your job with them at that time? What position did you hold?

A. I was the shop foreman.

Q. You were the foreman?

A. Right.

Q. And how long had you been foreman before that date in September 1951?

A. I would say approximately eight years.

Q. And at the present time are you still working with the K & S Electrical Company?

A. No, I am not.

Q. What is your work at the present time? Whom do you work for?

A. Well, I am an electrician working for a New York concern, Mason, Nixon & Kennedy.

Q. In the course of your work for the K & S Electrical Company did you work on ships or vessels?

A. Yes, sir.

Q. And how long had you been working on different vessels before September of 1951?

A. I would say about 12 years all together.

[fol. 80] Q. How long had you been working with Walter Halecki?

A. I think it was around six years.

Q. That was before this September 1951?

A. Yes, sir.

Q. And during that period of time were you his boss?

A. Yes, sir.

Q. He worked under you?

A. That is right.

Q. Now, with reference to the work on this vessel, was it the New Jersey, the name of the vessel?

A. That is right.

Q. Where was that vessel docked?

A. In Rodermond Shipyards, foot of Henderson Street, Jersey City.

Q. Do you know when it was docked at this location?

A. Well, I know it was September of 1951. I can't remember dates.

Q. What was the first date that you went aboard this vessel?

A. I think it was on a Monday.

Q. The date that this work was done that we are concerned with was September 29, 1951. That was a Saturday?

A. Yes.

Q. Are you referring to the Monday before that Saturday?

A. Yes, sir.

Q. Were you acquainted with a contract with reference to the work to be done by your company?

A. Yes, sir.

Q. On this vessel. Where were you shown this contract?

A. Well, it was handed to me by somebody. I don't remember exactly who. But it might have been a man from Rodermond Industries office or it might have been my own boss. I don't remember.

Q. Does this appear to be the specification of repairs which was shown to you?

A. Yes, sir, that is it.

Mr. Baker: I will offer that in evidence.

[fol. 81] Mr. Mahoney: I have no objection to this document as a list of the repairs, but I object to its characterization as a contract.

Mr. Baker: We have asked and served a subpoena on the defense to produce the contract. Do you have it now?

Mr. Mahoney: We do not.

Mr. Baker: Will it be produced?

Mr. Mahoney: This document is entitled Rodermond Industries. It is not a document purporting to be between this defendant and any other party. We have no such document as Mr. Baker holds in his hand. This is a list of repairs represented by Rodermond Industries.

Mr. Baker: On the account of this defendant, New York and New Jersey Pilots Association, 24 State Street.

Mr. Mahoney: This defendant has no such document.

The Court: Don't discuss it before the jury.

Members of the jury, just as statements made by counsel in their opening are not evidence, these statements are not evidence. They really have nothing to do with the case.

Mr. Baker: I thought we would save a little time, your Honor.

The Court: Is there any objection to it going in?

Mr. Mahoney: No, your Honor.

(Marked Plaintiff's Exhibit 5.)

Q. With reference to Exhibit 5, particularly what of this list of repairs were you to work on, you yourself, with Mr. Halecki?

A. Well, here it is, item No. 2, port and starboard generators.

[fol. 82] Q. Will you read from that item 2 as to the work you were to do with Mr. Halecki?

A. It says clean and adjust brush riggings and brushes, spray clean with carbon tetrachloride the armature and field winding to remove all traces of dirt and film. Close up and prove in good order.

Q. And this appears in this document under item No. 2?

A. That is right.

The Court: Who gave you that document?

The Witness: As I said before, sir, I don't remember who gave it to me. It might have been my boss or it might have come in from the boy that makes them up in Rodermond's office. I don't remember which, sir.

Q. And who did you consult with on the vessel with reference to this item that you mentioned, No. 2, when you went there on that Monday?

A. Well, in reference to the engine room work, I got to the chief engineer on the boat.

Q. Did you discuss that item number 2 with the chief engineer?

A. At some time. I don't know if it is just Monday.

Q. And that is the chief engineer on the vessel?

A. Yes, sir.

Q. What took place at that time when you discussed it with the chief engineer on the vessel?

A. Well, we knew we had to do this cleaning and it is taken for granted, at least, we know it has to be done when there is nobody else on board ship. So we just wanted to determine when would be the best time to do it. So it was either done at night or on the week-ends. So the chief agreed that would be the best for him that it be done on a Saturday.

Q. When you say the chief, you mean the chief engineer on the ship?

A. Yes, sir.

[fol. 83] Q. And that was agreed then to have it done that coming Saturday, the 29th of September, 1951?

A. Yes, sir.

Q. Did you discuss with him at that time the work to be done with carbon tetrachloride?

A. Oh, yes.

Q. And what was said by you and what was said by him, if you can recall that?

A. Well, it was just a discussion as to when the best time would be to do it, to do the work.

Q. Did you know at that time that the carbon tetrachloride was dangerous?

A. Yes, sir.

Q. And you had known it for some time before that date?

A. That is right.

Q. Did you discuss the danger of the use of this carbon tetrachloride with the chief engineer at that time?

A. I don't think so. We just take those things for granted. We knew what it was all about.

The Court: That is the reason you discussed fixing a particular time when to do the work?

The Witness: That is right, your Honor.

Q. And the time that you picked was the time when no one else would be on the vessel?

A. That is right.

Q. You discussed that with the chief engineer?

A. Yes, sir.

Q. Was it then understood that there would be nobody else on the vessel, other than the men who were working?

A. Yes, sir.

Q. Now, did you discuss this work with anyone else aboard that vessel?

A. I don't think so.

Q. Did you go on board that vessel on any other date?

A. Oh, yes, we were working on it all week.

Q. What sort of work were you doing on it all week?
 [fol. 84] A. General repair work, according to the specifications, the items that had to be done.

Q. And Mr. Halecki worked there with you?

A. That is right.

Q. And were the members of the ship's crews and officers, were they aboard the vessel all week?

A. Yes, sir.

Q. What were they doing aboard the vessel all week?

A. Well, the engine crew were working on the diesel engines down below decks.

Q. Now what were they doing with them?

A. They were removing the heads on the diesel engines. I don't know in reference to what.

Q. That was the ship's crew that was doing it?

A. That is right.

Q. And you saw them working there?

A. Oh, yes.

Q. What other work was being done, what other things were being done by the ship's officers or crew from what you observed during that week?

A. Well, in the engine room that is all they were doing, working on the diesel engines.

Q. Now, did you make any preparations with reference to the work to be done before you came there that Saturday?

A. Oh, yes.

Q. When did you start making your preparations?

A. Well, on the Friday afternoon.

Q. Friday afternoon? That is September 28, 1951?

A. Yes.

Q. That is the day before you actually did the work?

A. Yes.

Q. Who was present at the time when you were making these preparations?

A. Well, everybody was there that had been working there all week.

Q. When you say everybody—

[fol. 85] A. From the Rodermond Industries, the ship's crew, the general working conditions.

Q. You mean there are people who are working for Rodermond Industries, the shipyard people?

A. Yes, sir.

Q. And there were members of the crew doing work on the vessel?

A. Yes, and my own men.

Q. Which one of your own men did you have? Other men besides Mr. Halecki?

A. Oh, yes, there were a couple of others besides Halecki and myself.

Q. Now, in the time when you were making these preparations were there any officers on the ship present?

A. Well, they were aboard.

Q. Was the chief engineer around at the time when you were making these preparations for your work that Friday afternoon?

A. He was in the engine room, yes.

Q. And he saw what you were doing? He was right there?

A. Well, he was there. I don't know if he saw me or not.

Q. But you were working right there in the engine room?

A. Yes.

Q. That is the same engine room where you were making your preparations?

A. Yes.

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DONALD CHRISTIE, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Mr. Christie, what is your position?

A. Personnel manager.

Q. And that is with what company?

A. Rodermond Industries.

Q. Did you, pursuant to a subpoena served on Rodermond Industries, produce some records concerning the repair work to be done on the vessel New Jersey?

A. I have them here, sir.

Q. In September 1951?

A. I have them here.

Q. You have them here?

A. Yes, sir.

Q. Have you a specification of repairs with reference to this vessel for that period?

A. I have.

Mr. Baker: May I see that, please?

(Witness hands to counsel who examines.)

Q. What is the date of this list of repairs?

A. September 24, 1951.

Q. And that is with reference to what vessel?

A. New York and New Jersey Pilots Association Pilot Boat New Jersey.

Q. And with reference to this list of repairs which you have produced here—withdraw that question.

Was that list of repairs for this vessel as between Rodermond Industries and the New York & New Jersey Pilots Association?

A. It is.

Mr. Baker: I offer that in evidence.

(Marked Plaintiff's Exhibit 6.)

The Court: What exhibit is that?

The Clerk: 6.

Q. Is that similar to the same one marked Exhibit P-5? Could you tell us by comparing them?

A. Yes, that is the same.

Q. Same one?

A. Same one, a duplicate copy, yes.

Q. How, customarily, are these lists of repairs prepared and submitted?

A. Well, as far as I know, the Pilots Association sub-[fol. 87] mits it to the company and the company prices them and works accordingly, if the bid is received.

Q. Does the shipyard inform the Pilots Association or the owners of the vessel?

A. As far as I know, no.

Q. How is that done?

The Court: He just told you.

Mr. Baker: Yes.

A. They have their repairs.

The Court: In other words, they prepare the list of repairs which they believe are required for the vessel and submit it to you and you price each item?

The Witness: That's right?

The Court: And that is what this reflects?

The Witness: That's right.

The Court: In other words, you picked up the repairs as submitted by them and your company, Rodermond Industries, specified the price?

The Witness: Yes.

The Court: And they accepted it?

The Witness: Yes.

The Court: And you went ahead with the job?

The Witness: Did the job.

Q. These pencil marks on this Exhibit 6—what are those figures?

A. Those are the prices for each item.

Q. I see. And then there is a total set forth for the amount, the total amount?

A. I believe that is it, yes.

Q. And then subsequently was there a bill submitted by you or Roderman* (sic) Industries to the owners of the vessel, New York & New Jersey Pilots Association?

A. I believe that is the procedure.

[fol. 88] Q. Have you got the bill there?

A. I don't believe so.

Q. Is this the bill (submitting)?

A. That is the bill.

Q. And that is the bill which was submitted under date of December 31, 1951, is that right?

A. That's right.

Q. And that is submitted by you to the New York & New Jersey Pilots Association?

A. Yes.

Mr. Baker: I offer that in evidence.

Mr. Mahoney: No objection.

Mr. Baker: No objection.

(Marked Plaintiff's Exhibit 7.)

Q. With reference to any of this work that is listed in these last two exhibits—was any of it subcontracted out by the Rodermond Industries to another company, if you know?

A. I believe so.

Q. Was the electrical work subcontracted out, as far as you know?

A. Yes. We don't have any electrical workers.

Q. You don't have electrical workers. So that you subcontracted it?

A. Yes.

Q. And to what company did you subcontract it? Can you find that out from your records?

(Witness examines.)

A. K & S Electrical Company.

Q. Do you know if you have a written contract with the K & S Electrical Company?

A. That I don't know. That would be in the office.

Mr. Baker: That's all.

[fol. 89]

Cross examination.

By Mr. Mahoney:

Q. Mr. Christie, were you employed by Rodermond in 1951?

A. Yes.

Q. Do you have any direct knowledge of this transaction with the Pilots Association?

A. None at all.

Q. No knowledge of your own, is that right?

A. No.

Q. These various exhibits which you have identified were all prepared by Rodermond, were they not?

A. The copies I have, yes.

Mr. Mahoney: Thank you, that's all.

Mr. Baker: That's all.

By the Court:

Q. You were given, as the Rodermond Company was given, of course, access to the vessel on which the work was to be done?

A. Yes.

Q. You had to get on the ship in order to do that?

A. Yes, we had to get on there in the yard.

Q. And at the time the K & S Company was authorized too?

A. Yes.

The Court: That's all.

DONALD DOIDGE resumed.

Direct examination.

By Mr. Baker (continued):

Q. Before we continue with your questioning from where we left off after the morning recess, this vessel, the New Jersey, was it, docked on a drydock or was it in the water?

A. It was in the water.

[fol. 90] Q. And it was off a pier, did you say? Which pier was that?

A. It was on the street side, on Henderson Street.

Q. Which water was it in, do you know?

A. In what is known as Morris Basin.

Q. That is Jersey City?

A. Yes, part of the Hudson River.

Q. And to get on the ship—how did you get on the ship?

A. From a gangplank from the street side.

Q. In other words, it was docked against the dock and you got on through a gangway?

A. That's right.

The Court: Mr. Mahoney, is there any question but what this vessel was in navigable waters?

Mr. Mahoney: I think not, sir.

Mr. Baker: All right.

The Court: And you agree that the general maritime law prevails?

Mr. Mahoney: There is no issue there, sir.

Mr. Baker: All right.

Q. You were telling us about the two air hoses which you brought for the vessel and the uses which were made of these air hoses. What else did you bring aboard the vessel on the preceding day, namely, a Friday, before September 29, 1951?

A. Besides the air hoses I took a high compression blower on board.

Q. And this blower, I understand, was a blower which belonged to Rodermond Industries.

A. That's right.

Q. And you brought it aboard the vessel that preceding Friday?

A. Yes, sir.

Q. Will you describe this blower to this Court and the jury as best you can.

A. It is a blower. It has a motor on one hand with a propeller that turns over 35,000 rpm, revolutions per minute, [fol. 91] heavy pressure blower, and then it is shaped like a funnel, something like a megaphone.

Q. Is it a portable one, that you carry?

A. It is a portable, yes.

Q. Can you give us the dimensions, approximately?

A. Well, I would say it is approximately 4 feet long and maybe 18 inches in diameter and it is very heavy. It takes two men to lift it.

Q. And you and who—

A. And Walter Halecki.

Q. Brought it aboard the vessel?

A. That's right.

Q. The Friday preceding?

A. That's right.

Q. How is that operated, in what manner?

A. It was plugged into an electric circuit on board.

Q. Did you plug it in that Friday?

A. Well, ~~up~~, we plugged it in when we were ready to use it.

Q. When you got ready to use it?

A. That's right.

Q. Did you place it in position the preceding Friday?

A. Yes, I did.

Q. With reference to its capacity—did you give us its capacity?

A. No. I have no idea of the capacity of it, sir, no.

Q. The position in which you placed it—how high was it above the engine room floor?

A. I would say about 7 to 8 feet. I didn't measure it. That is just a guess.

Q. Did you say you tied something to the rail?

A. I tied the blower to the rail.

Q. And how did you do that?

A. Just with rope around the handrail, around the top of the engine room.

Q. Could you give us the dimensions of that engine room?

A. I never measured it but I would say approximately 40 feet by 30 feet, maybe—40 feet long, fore and aft, 30 feet wide, approximately.

[fol. 92] Q. And how high would you say that engine room was from floor to ceiling?

A. From the lower engine room?

Q. Well, that engine room that is involved here.

A. Yes?

Q. From the floor to the ceiling, how high is it?

A. I would say approximately 18 feet.

Q. So that the position in which you placed this blower, as you described it, was 7 or 8 feet above the floor. It would then be, would you say, about 10 feet below the ceiling?

A. That's right.

Q. With reference to the engine room that we are discussing—is that what is known as a lower engine room?

A. Yes, sir.

Q. And with reference to that engine room, what was the ventilation that was part of the ship?

A. Well, they had two electric blowers, port, and star-board. They were both blowers for the engine room.

Q. And where were those blowers located with reference to the part of the engine where they were located?

A. They had ducts, a series of ducts running around the engine room—around the rails and underneath the catwalks.

Q. And where would the exit or the outside portion of the ducts be, in what part of the vessel?

A. Well, they went all the way through the deckhead to the outside air.

Q. I mean, where were they, in the ceilings or in the walls or in the floor?

The Court: He just described where they were, didn't you?

The Witness: Well, I don't know whether he means the fresh air coming in or the outlets from the duct.

Q. The outlets, that's the word I mean, the outlets.

A. The outlets from the duct? Well, as I say, on the [fol: 93] lower engine room, on the ceiling, underneath the catwalks, over the diesel engines.

Q. So were they all in the ceilings, all the outlets?

A. Yes, sir. There might have been some in the upper engine room. I don't know for sure.

Q. I am talking about this particular engine room that is involved here where the cleaning of the generators would be done.

A. That's right.

Q. So that they were all in the ceilings, these outlets?

A. Yes, sir.

Q. And this ventilating system which was part of the vessel—did that exhaust the air or did that put air into the engine?

A. I think it put air into the engine.

Q. Was there anything else in that room that you could describe to us further? You have told us about the duct system with the ventilation. What other ventilations were there in that room before you started doing your work, before you started setting up your work?

A. Well, there were a couple of oscillating fans around a strategic location for the crew.

Q. Were any of those fans in use at the time you were doing your work?

A. Well, I took one and put it on the floor alongside of where we were working, at the generator, one oscillating fan.

Q. And will you describe this fan to us, in size.

A. It is just like a regular house fan. I would say it was a 12-inch blade. It might have been 14.

Q. And what did that fan do while you were working?

A. Well, it kept blowing. As you were working it kept blowing the fumes of the carbon tet away from you where you were spraying.

[fol. 94] Q. Just a regular door?

A. Yes, a little narrower than a house door.

Q. What else did that room have, this lower engine room if there was anything else in reference to its ventilation?

A. Nothing that I can recall.

Q. That is all you remember?

A. Yes.

Q. We have a number of photographs here. I am going to ask you whether or not—well, first of all, does that indicate the vessel, the New Jersey, the one that you did your work on?

A. That is it.

Mr. Baker: I will ask that it be marked in evidence.

Mr. Mahoney: No objection.

(Received in evidence as Plaintiff's Exhibit 8.)

Q. Looking at these other photographs, could you select one of these photographs so that we could point out to this Court and jury to show us just where you tied onto this lower end, as you described—you tied it onto a rail and placed it in that engine room?

A. This is it right here (indicating).

Q. This one here?

A. Yes, sir.

Q. Does this photograph indicate the vessel, the New Jersey, the engine room of the vessel on which you were doing the work? Is that a true representation of the vessel as it existed at that time?

A. That is right.

Mr. Baker: I offer it in evidence.

(Plaintiff's Exhibit 9 received in evidence.)

The Court: That is a picture of what?

Mr. Baker: That is a picture of the engine room.

The Witness: The access ladder in the engine room.

[fol. 95] The Court: I think you ought to put an arrow here showing where it is going.

Mr. Baker: I will.

Q. Will you put an arrow and show us where the steps are and where they go down.

A. Yes, this is the stairwell, the ladder.

The Court: You can't see the steps of the ladder?

The Witness: No, just the hand rails at the top of the ladder.

The Court: Put an arrow indicating there are steps going down and those steps lead to what you term the lower engine room? Is that right?

The Witness: Yes, sir.

Q. This is an arrow which points to the steps going down. And where was the railing that you placed this blower?

A. It was right in here, in this corner.

The Court: Right in the corner. Would you put an arrow on the railing where you tied on this blower?

The Witness: It is right here, and then from here also.

Q. So you put two arrows to the two parts of the railing where you tied this on?

A. Right in this circle here.

The Court: Would you stand up and demonstrate to the jury and pass the photograph along to the jury.

First of all, what is in this photograph which is marked Exhibit 9? What is this plate here?

[fol. 96] The Witness: This is the catwalk around the upper engine room where this steel plate is.

Q. And that is about how many feet above the floor?

A. I would say about 8 feet above the lower engine room.

Q. And the lower engine room is down below here?

A. These two rails are handrails on the ladder that goes

down and the blower was fastened in the corner of these two rails here where it was shooting down into the engine room.

Q. The stationary rail is where you attached the blower?

A. That is right.

Q. And the blower was facing down into the engine room?

A. Yes.

Q. And the generators were down below on the floor?

A. That is right.

Q. Down below?

A. Yes.

Mr. Baker: I would like with the permission of the Court to pass this on to the jury.

The Court: Yes.

(Plaintiff's Exhibit 9 shown to the jury.)

Q. Now, with reference to the generators which were to perform this work, can you from this group of pictures pick out the photographs which would show those generators so that we can present it to the Court and jury?

A. This one is the main generator here, is the best picture of it. Of course, here is one which is attached to the diesel engine that drives it.

Q. Are these both pictures of the generators which were involved at the time when you went in there in September of 1951 on this vessel?

A. Yes, sir.

[fol. 97] Q. That is a true representation of those generators?

A. Yes, sir.

Mr. Baker: I offer them in evidence.

Mr. Mahoney: No objection.

The Court: Let me see Plaintiff's Exhibit 9, please.

(Plaintiff's Exhibits 10 and 11 received in evidence.)

Q. Now, would you mark on Exhibit 10 with a large letter G the generators on which the work was being done? And also would you mark on Exhibit 11 with a G the generators on which the work was being done?

A. Yes.

Q. Could you tell us the size of these generators with reference to the measurements, approximate measurements?

A. Well, I think they are about four foot high and in length they were about five foot. I really can't say for sure now.

Q. Where were they placed? On the floor or above the floor of the engine room?

A. They were slightly below the floor.

Q. Below the floor?

A. Maybe about six inches.

Q. They were set into the floor?

A. Yes; there was a regular bed for them, a bedplate where they were bolted down.

Q. And they are round? Circular?

A. Yes.

Q. Are these the generators which you were to clean with carbon tetrachloride?

A. Yes, sir.

Q. That is the work that was being done on this day?

A. That is right.

Mr. Baker: I would like to pass this on to the jury, with your Honor's permission.

[fol. 98] Q. Now, with reference to some of these other photographs here could you select a photograph here which would show the ship's ventilating system as to where the outlets were? The photograph which would best show it.

A. Well, these all show part of it.

Q. All right. Now, these all show part of it?

A. Yes.

Mr. Baker: I will offer these four pictures in evidence.

(Plaintiff's Exhibits 12, 13, 14 and 15 respectively received in evidence.)

The Court: You did not mark the ship's ventilators here, did you?

The Witness: Not yet, sir.

Q. Now, looking at this exhibit marked Exhibit 12, what does that represent first?

A. Well, this is the lower engine room.

Q. Lower engine room?

A. Yes.

Q. What part of the lower engine room does it show?

A. Well, it is from the ladder looking forward alongside of the main engine.

Q. Is it a picture of the ceiling?

A. Yes.

Q. With reference to the ship's ventilating system could you mark a V the ship's ventilating outlets, with a large V.

A. There is one here.

Q. Mark it with a V.

A. And there is one also here on this one. There is one under here that is barely visible, right here.

Q. In other words, you have marked in this photograph, Exhibit P-12, with a V three outlets of the ship's ventilating system?

A. That is right.

Q. Are they all in the ceiling?

A. Yes, sir.

[fol. 99] Q. And with reference to those two outlets, are they in round shape?

A. Yes, except the one coming over the side. This is just a square duct that opens up.

Q. In other words, one of them shows a square duct. Will you stand up and face the jury and show them the ventilating outlets and then we will pass them on to the jury.

A. This here is the square duct that runs along the ceiling of the lower engine room and this round rosette thing is the outlet for the air. There is another one back here and then on the end here there is just a square duct where it opens up and blows down on the side.

Q. That is all in the ceiling of the engine room?

A. Yes, that is one section.

The Court: Have him mark the duct and the outlet.

Mr. Baker: Yes.

Q. Mark D for duct and put an O for outlet.

A. This would be an outlet here, and, of course, this is a duct with an outlet here, too.

Mr. Baker: Put a D for the duct again and an O for the outlet.

Q. Now so we won't get mixed up on this, I see before you had a V and you have changed that to a D and an O. The D is for duct and the O is for outlet?

A. That is right.

Mr. Baker: With the permission of the Court I will pass that on to the jury. Hold that for a moment until I get some of these photographs explained.

[fol. 100] Q. Here is Exhibit 13. Mark that the same way, D for duct and O for outlet. We are talking now about the ship's ventilating system.

A. Well, there is a series of ducts. This is a duct here. That is also one.

Q. Where is the outlet?

A. There is no outlet shown on this. This is just the ducts going down into the engine room.

Q. What part of the engine room does that picture, Exhibit 13, show?

A. This is the upper part, the upper engine room. This is on the after end of the engine room.

Q. Is that where the work was being done?

A. Yes, and this is right above it.

Q. So this exhibit 13 does not show any outlets at all?

A. No, it just shows the duct going down.

Q. Now, the next exhibit is 14. Will you mark D for duct and O for outlet in that photograph?

A. There are no outlets here. This is also the main duct going down from the outside.

Q. Mark that with a D. Put down MD, meaning main duct.

A. This one supplies all the air for either the port or the starboard blower, motor. That comes down from the outside and then distributes inside the engine room. This is also one of the ducts.

The Court: I am not clear. Does that feed air into it or does it draw air out?

A. It feeds air in, sir.

Q. What part of the engine room would this Exhibit 14 be that you just marked? Is that the lower engine room? The middle? Or the top?

A. No, this is the upper engine room.

Q. Are there any outlets in that picture which we have [fol. 101] just marked, Exhibit 14, or were they all ducts?

A. These are all ducts here.

Q. Now, the next photograph you have taken is Exhibit 15. Would you mark that with a D for the ducts and an O for the outlets?

A. This one, it just shows one outlet.

Q. Mark that with an O.

A. This is, of course, all duct work.

Q. Now, what part of the engine room was this photograph, Exhibit 15, taken of?

A. This is lower engine room.

Q. That is the lower engine room?

A. Yes, sir.

Q. And this duct that appears, is that also in the ceiling of the engine room?

A. Yes, sir.

Q. Just the one duct?

A. That is right.

Q. It is near the ladder, I see.

A. Yes, sir.

Q. Is that ladder the ladder which you have shown us before as going out of the engine room?

A. I think it is, the one going up to the top or upper engine room and outside.

Mr. Baker: With the permission of the Court may I pass these to the jury?

The Court: Yes.

(Exhibits shown to jury.)

The Court: May I see those exhibits?

Mr. Baker: Yes, surely.

Q. Now, coming to Saturday morning, that is, September 29, 1951, will you tell us just what time you arrived on the vessel.

A. Well, I got down there about, I would say, about ten or fifteen minutes past eight in the morning and Walter was there waiting for me when I got down with the truck.

[fol. 102] Q. You mean Walter Halecki?

A. That is right.

A. Yes, I brought three gas masks down there on Saturday morning.

Q. Are they alike, the three gas masks? Are the three of them alike?

A. The gas masks themselves are what they call Army surplus. It is regular Army gas masks.

Q. And they belong to your own firm?

A. K & S Electric, yes.

Q. And you brought that aboard the vessel that Saturday morning?

A. Yes, sir.

Q. Did each of you use a gas mask?

A. Yes, sir.

Q. Now, will you describe this gas mask as best you can, these gas masks that you brought on and used that morning.

A. Yes. Well, it fits very tightly over the nose and the mouth, and then it has got a strap about the back of the head which holds it very tight and there is a hose that comes down to a cannister in a canvas bag that is strapped around your waist with a belt to hold it there, and you breathe through that all the time.

Q. And you breathe through that?

A. Yes.

Q. That is, these cannisters which are in these gas masks?

A. That is right.

Q. Like a knapsack, is it? Or can you describe it?

A. In a way, yes.

Q. Is that the same general type of gas mask that you used before?

A. Yes.

Q. You used that before?

A. Yes.

Q. That is the same general gas mask that you used before in the work you did similar to this type of work?

A. Yes.

[fol. 103] The Court: I think we will take our mid-afternoon recess.

(Short recess.)

Q. Would you tell us, then, the procedure, the way you started your work? About what time did you start your work that morning, September 29, 1951?

A. We started approximately 8.30 in the morning.

Q. Is that when you started to do the spraying?

A. No, that is when we started to set up all the paraphernalia, you might call it.

Q. When did you start to do the spraying?

A. I would say approximately a quarter to nine, nine o'clock.

Q. That morning?

A. Yes.

Q. And who was on the vessel other than you and Mr. Halecki, that Saturday morning?

A. There was only a watchman.

Q. A watchman for the vessel?

A. That's right.

Q. And did you see or talk to that watchman?

A. Yes.

Q. And what did you say to him and what did he say to you?

A. Well, when I saw him on there I would just pass the time of day and then, of course, I warned to stay out of the engine room and we were going to do the spraying.

Q. And you started the spraying about a quarter to nine or nine o'clock?

A. That is right.

Q. Will you tell us the procedure that you pursued when you started this spraying? How did you do that?

A. Well, we have the air and everything on. The spray gun is attached to one of the air hoses. The spray gun itself has a suction hose that went down into the can of carbon tetrachloride, forming a suction and spraying into the generator coils and the armature.

[fol. 104] Q. Where was that can kept?

A. Well, we kept it close to the job where you were spraying because it only had—

Q. Was it on the floor, or outside?

A. On the floor, yes.

Q. On the engine room floor?

A. Yes.

Q. And was the can open?

A. Yes.

Q. And you had it attached so that it went through the hose?

A. That's right.

Q. Tell us just what went on there?

A. Well, the hose from the spray gun goes right into the can and wherever you move, there was only about three foot of hose on it, and whenever you moved you had to move the can with it. So we started spraying, as I said, about nine o'clock, maybe, and we sprayed for about maybe ten, fifteen minutes and then we would go up on deck or maybe up in the messroom.

Q. How do you alternate with reference to this spraying? How long are you downstairs spraying into the engine room?

A. Well, there is one thing I think I ought to say here first. On the Friday before I personally had been helping the men lifting the motor in. I sprained my wrist on my right hand. So when I started to work I found out that my wrist wouldn't let me hold a gun or press the trigger on the gun, on the spray gun. Therefore, I started but I couldn't do it. So Walter told me that he would take over and do the spraying if I would just help him move the stuff around.

Q. Well then, did you go down into the engine room and start this spraying?

A. Yes, I did.

Q. And for how long a period of time did you spray?

A. Oh, I don't think I was spraying two or three minutes because I couldn't do it.

Q. So that outside of the starting for two or three minutes; you did no spraying in the engine room?

A. That's correct.

[fol. 105] Q. So that Mr. Halecki was the one who did the spraying?

A. That's right.

Q. He sprayed for how long a period of time before he went out of the engine room?

A. Well, I would say from 10 to 15 minutes.

Q. And then he came out of the engine room?

A. Yes, sir.

Q. And he stayed out how long?

A. About the same amount, 10, 15 maybe 20—I don't know.

Q. So he sprayed a while and then he was out of the engine room?

A. Yes.

Q. And then he went back again?

A. That's right.

Q. You alternated that way?

A. Yes.

Q. During the time that he was spraying in the engine room, you stayed on top of the deck?

A. At first I stayed down—the first two or three times down there I stayed down with him altogether. Then, as the can got higher he could move it a little himself and then I wouldn't go down quite as much. I would just look in from the top of the engine room.

Q. During the period of time that he was doing the spraying, during that day, did he wear a gas mask?

A. Oh, yes.

Q. He wore it at all times?

A. Yes.

Q. And that is the gas mask that you have described?

A. That's right.

Q. When did he complete the work of spraying? About what time was it that the spraying stopped?

A. Well, we stopped for lunch at 12 o'clock and then we started in again at 12.30 or going on one, and I think we worked through until about, I think maybe 3 or 3.30 that afternoon.

Q. And was the job finished then?

A. Yes.

Q. At 3 or 3.30?

A. Yes.

[fol. 106] Q. Then what was done?

A. Well, we just shut everything off and left.

Q. You left the vessel?

A. Yes, sir, we disconnected the air hoses and threw them back in the engine room.

Q. When he left the vessel—I am talking about Mr. Halecki—did he say anything to you with reference to anything concerning his condition at that time?

A. The only thing, when I was leaving him, we were up on the street, and the only thing he said to me was that he had a peculiar taste in his mouth, but that is the only thing that was said.

Q. What did he do after that, of what you know?

A. He left me right there and then. I went home and he was either going home or going to his mother-in-law's—I don't know which.

Q. Did you see him again or was that the last time you saw him?

A. No, I saw him in the hospital after.

Q. Before this date of September 29, 1951, when you worked with him for some time, you say, was he in apparent good health?

A. Yes.

Q. Was there anything wrong with him of any kind?

A. I don't think he ever lost a day.

Q. Did he work steady?

A. Very steady.

Q. How was he with reference to being sober? Was he sober or not on the job?

A. I never seen him take a drink. Of course he was like any man, he would like to take a drink once in a while, like any man, but in the approximate six years I knew him I never saw him under the influence of liquor or anything else.

Q. Was he sober on the job?

A. Very, very.

Q. And was he sober on the job on the day when this took place, September 29, 1951?

A. He sure was.

Q. During the course of the time when you were on this vessel, for the week before that, September 29th, did [fol. 107] you consult with anyone from the vessel concerning the work which you were doing on board the vessel?

A. Well, we have to consult with them from time to time as the work progresses.

Q. Whom did you consult with in behalf of the vessel?

A. If I am doing work in the engine room I have to consult the chief engineer on the ship.

Q. And did you consult with him?

A. About what, sir?

Q. I mean during the course of the work, the work that was being done by your company.

A. Oh, yes.

Q. And was the work being done under the supervision of the chief engineer, as far as the engine room was concerned?

A. Oh, yes.

Q. And if he disapproved of any of the work that you were doing or the members were doing—

A. It had to be done to his complete satisfaction.

Mr. Mahoney: I object to that last.

The Court: Sustained, as to the last question.

Q. With reference to the carbon tetrachloride which was used on this job, I think you said you knew it was a dangerous chemical.

A. Yes.

Q. Had you used that before this particular day?

A. Yes, from time to time.

Q. When did you use it? On this occasion would you use it or under what occasion would you use carbon tetrachloride for this type of work, cleaning generators?

A. Always for cleaning motors or generators.

Q. Would you use it when it was specified?

A. Oh, yes.

Q. Was there anything else that was used other than carbon tetrachloride?

A. Well, there is, yes.

Q. And since this date have you used carbon tetrachloride?

A. Oh, no.

[fol. 108] Q. Never used it again?

A. No, sir.

Q. And before September 29th, 1951 were there occasions when you used substitutes for carbon tetrachloride?

A. Occasionally we had, yes.

Q. And if there was no specification of carbon tetrachloride in the specifications for the work to be done, would you, under those circumstances, use the substitute?

Mr. Mahoney: Objection, please, as speculative.

The Court: I will allow it.

A. Yes. If there was no particular specification? In fact, I can put it this way. In some specifications they read "Carbon tetrachloride to be used or its equivalent."

The Court: Prior to September 29, 1951 you did use carbon tetrachloride?

The Witness: Oh, yes.

The Court: You used it generally, did you not, for the cleaning purposes?

The Witness: Yes.

The Court: Whether or not it was specified?

The Witness: Not always.

The Court: Was there any time when it was not specified?

The Witness: That could be, sir.

The Court: All right.

Q. But was it a general rule, as a matter of practice in the work you did, if it was not specified in the specifications—namely the use of carbon tetrachloride to clean the generators and so forth—would you use a substitute for carbon tetrachloride?

A. Wherever it was possible, yes.

[fol. 109] Q. And that would be a safe chemical?

A. A lot safer than carbon tet.

The Court: Are there any other questions?

Cross examination.

By Mr. Mahoney:

Q. Had you, for example, used carbon tetrachloride for cleaning generators in a factory, perhaps?

Mr. Baker: I object, there is no materiality in this case.

The Court: Overruled.

A. When you come right down to it, there is a lot of difference between doing it in an engine room and doing it in a factory, doing it in an engine room on a ship.

Q. Had you ever used it in a factory anywhere on shore before this occasion?

A. That I don't know for sure. I don't know for sure.

Q. Do you think it is likely that you did, though?

A. It is possible, yes.

Q. And in such a place, wherever it may be, a factory or a building, would they customarily be equipped with any sort of overhead blowers or ventilation system built into the building?

A. There is no comparison, sir, between the two.

Q. As far as you know today, can you assemble all of this work properly, in your opinion?

A. Yes.

Q. There is no doubt in your mind it was operating properly, assembled properly, is that right?

A. Yes.

[fol. 110] By the Court:

Q. What was the basic function of the air hoses?

A. One was to operate the spray gun for the carbon-tetrachloride and the other one we tied underneath the generator where we were spraying to blow the spray from the man who was spraying with the gun.

Q. Then in part it was used as a ventilating system or a ventilating method?

A. Part of it, yes.

Q. And what was the basic purpose of the blower system?

A. To stir up the air in the engine room, to blow it around.

Q. Well, again, it was used for purposes of ventilation?

A. Yes, sir.

Q. And did you use anything else for ventilation purposes?

A. Well, this portable blower that we brought ashore, as I say, was tied on the rail. It was an exhaust blower and it

was blowing out of the door, sucking the foul air from the lower engine room, supposed to be blowing it out the door.

Q. And in addition to that, you had electric fans?

A. Electric oscillating fans, yes.

Q. And when you started to work that morning were you satisfied in your own opinion that this was adequate ventilation for the men to work with carbon tetrachloride?

A. Well, sir, I am not an engineer but I was satisfied it was sufficient.

Q. You were satisfied it was sufficient?

A. That's right.

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Q. On the day you started the work, you brought certain equipment on there that belonged to your own employer, is that correct?

A. Yes.

Q. And I think that equipment included gas masks?

A. That is right.

Q. And they were the property of K & S?

A. Yes.

[fol. 111] Q. Was it customary to use gas masks in doing the type of work you were doing?

A. Oh, yes.

Q. And you had used these same masks on occasions before this?

A. Yes.

Q. How long before this particular day had it been since you had used these masks?

A. That is hard to say now, sir. I don't remember.

Q. Well, can you give us a rough estimate? Was it a week or a month?

A. Probably a month to six weeks.

Q. Was it in your practice to inspect these masks between jobs?

A. Yes, we check them.

Q. Did you check them before this job?

A. I sure did.

Q. How did you test them to see whether they were all right?

A. You can breathe into them. There is a kind of a taste.

I don't know whether you call it a taste or a smell, when they are foul. Then you change the cannister on them.

Q. What is this cannister, please?

A. Well, it is just like a can. It is filled with some kind of substance, I don't know exactly what it is. It is like charcoal and other stuff that purifies the air that goes through it.

Q. And the efficiency of the gas mask depends upon the cannister, to a great extent, does it not?

A. That is right.

Q. And the efficiency would depend on how often the cannister was changed, for example?

Mr. Baker: I object to that unless he knows, as an expert on gas masks.

The Court: Well, he said he has worked with them for a period of time. You have already indicated you would know whether a gas mask is functioning properly, is that right?

The Witness: I think I do, sir. Maybe I was proven wrong, I don't know.

[fol. 112] Q. My question was, Mr. Doidge, do you feel, from what you know of that particular type of mechanism, that the efficiency of the mask depends to some extent on how often the cannister is changed?

A. Yes.

Q. Do you happen to know how frequently this cannister was changed in this particular mask?

A. No.

Q. Did you change them?

A. When we changed, we changed the three at once.

Q. I see. Do you remember when the cannister had been changed before this day?

A. No, I couldn't remember that now.

Q. I see. You did not change it that day, anyway?

A. Oh, no, no.

Q. Or within the prior week, perhaps?

A. No. In fact, I know I did the job prior to that with the same masks.

Q. I see. Did they operate all right at that time?

A. Yes.

Q. When you did this work on that particular day, you

were in and out of the engine room frequently, I understand?

A. Oh, yes.

Q. And, as a matter of fact, for at least the first part of the job you were down there constantly?

A. For the first part, maybe a half hour—no, let's see—about an hour and a half.

Q. And after that you were up and down?

A. That's right.

Q. Actually the work, even as done by Mr. Halecki, was intermittent, wasn't it?

A. Yes.

Q. Was it your practice to work for fifteen minutes and knock off for a while? It was, wasn't it?

A. That is right.

Q. So both you and Mr. Halecki were up and down, is that right?

A. Yes.

Q. When you went down there and you worked, did you [fol. 113] wear a mask?

A. Most of the time, yes. Once in a while I went down there and take a quick look around without it on.

Q. But if you went down to move anything?

A. Then I would put it on.

Q. You would use a mask. And did the decedent have his mask on most of the time, as you recall?

A. All the time. As he was down there, as I said, most of the day when there was any work to be done, he kept it on.

Q. You never saw him without the mask, did you?

A. No.

Q. Where would you and Mr. Halecki put your masks when you knocked off for a while?

A. I don't remember exactly where we put it but I think sometimes we left it in the galley when we came up the ladder on the forward end, I think it is, and left them in the galley, right at the top of the engine room stairs.

Q. Then, when you are going down, you put them on, is that right?

A. Put them on right after that point.

Q. Did you see the decedent do the same?

A. Yes. In fact, we had the three of them laying there.

Q. Did he always use the same mask?

A. No, there was no way of telling. We just grabbed one as we went down. He might have been wearing mine and I might have been wearing his, or used various ones at different times.

Q. You might have worn all three during the day?

A. That's correct.

Q. So you might have had a mask on or off, and he had one off, or vice versa?

A. That's right.

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Q. I show you a picture, Mr. Doidge, and ask you if this is a fair representation of the skylight or overhead opening [fol. 114] on the pilot boat New Jersey?

A. That is right, yes. Of course, these were wide open on the picture.

Mr. Mahoney: I would like to offer these.

Mr. Baker: Was that the upper or lower engine room?

The Witness: No, that was right in the ceiling, at the top.

Mr. Baker: No objection.

(Marked Defendant's Exhibit B.)

By the Court:

Q. These lead right down to the engine room where you are working?

A. All over to one side, sir.

By Mr. Mahoney:

Q. Mr. Doidge, will you point out to the jury the part of the picture which represents the ventilator or skylight which leads directly to the engine room, please?

A. This whole thing is the skylight, as far as that goes.

The Court: The part that is open?

The Witness: The part that is open, yes.

The Court: Pass it to the jury, please.

(Handed to the jury who examines.)

The Court: That means really that what you have there for ventilation was the air hoses, the blower system, the

openings in the ducts, the fans, the door leading out into the open and the skylights?

The Witness: And the portable blower.

The Court: And the portable blower.

The Witness: Yes.

[fol. 115] Q. Just one more question, Mr. Doidge. Is it your opinion that the ventilation on the boat was adequate on the day you worked there?

A. As far as I am concerned, it was, at that time, anyway.

Mr. Mahoney: That's all.

Redirect examination:

By Mr. Baker:

Q. The door leading to the open—how high is that above the deck?

A. Above what deck, sir?

Q. Above the deck of the engine room.

A. Oh, approximately nine foot, eight, nine foot.

Q. That is the lower part of the door?

A. Yes.

Q. In other words, the lower part of the door is about nine foot above the deck of the engine room?

A. Yes.

Q. You were talking about the difference with a factory job. What is the difference between work in the factory and work in this low engine room in this ship?

A. Well, usually in a factory or in a place of business like that, you have much more air space. You have windows all around you and you have higher ceiling space.

Q. It is not confined like in the engine room?

A. That's true, there is no comparison.

Q. Was this a confined area, this engine room?

A. Well, definitely.

Q. You told us a little while ago, in response to the question of counsel, concerning whether you thought it was adequate ventilation, when you went upon that job, what you thought. Do you now think it was adequate ventilation?

A. No, I don't naturally.

Q. If anything of this substance got on your hands, it didn't affect you, did it?

A. No. Well, it dries the skin, but only for a short time. [fol. 116] Q. You didn't have anything after effects?

A. No.

Q. In using or handling this carbon tetrachloride?

A. No.

Q. As far as you were concerned. And you personally don't know whether or not any part of it touched his hands, as far as you personally are concerned?

A. No, I wouldn't know, not for sure.

Q. With reference to the work which you are doing, you knew, you told us, of the dangers of carbon tetrachloride, is that correct?

A. That is correct.

Q. And isn't it a fact that you spoke to the engineer of the vessel before you used it that Saturday? And did you talk to him about the danger of the carbon tetrachloride, the carbon tetrachloride?

A. He knew about it.

Q. You talked to him about it?

A. Surely. That is the reason we wanted the ship cleared.

Q. With reference to the preparation of these specifications, which is in Exhibit 5, which you used in the work which you were to do for your company—with reference to deciding what work was to be done and placed in these specifications, is that done by the ship or by the contractor, as far as you know? Who would tell that?

The Court: I don't see any point in that. He doesn't know and you had a witness who testified directly as to how it was prepared. Now why confuse the record?

Mr. Baker: It was just another question on it.

The Court: Do you have any other questions?

Mr. Baker: That's all.

The Court: Strict recross, please.

Mr. Mahoney: Yes.

[fol. 117] Recross examination.

by Mr. Mahoney:

Q. Mr. Doidge, there has been some reference to an upper and a lower engine room. Actually, wasn't it just one big room here?

A. Well, in a way, yes.

Q. This is one big room with a catwalk around, about half-way up, is that right?

A. No, because there is a certain section of the engine room which is on one side of the ship.

Q. But actually there were not two rooms, were there, just for clarification? There were not two rooms? It was just one big room?

A. That's right. The skylight was on one side.

Q. Mr. Doidge, just one point I would like to clarify. You told me and you told his Honor that in your opinion the ventilation was adequate at the time in question, is that correct?

A. Yes.

Q. Now you told Mr. Baker a moment ago that your opinion today is that the ventilation was not adequate?

A. I said there is a possibility. I don't know.

Q. I don't recall your using the word "possibility." What is your opinion today, Mr. Doidge?

A. Well, considering what happened, there could not have been enough ventilation to take all that stuff out of there.

Q. What occurred to change your opinion, Mr. Doidge?

A. The man died.

Q. Well, do you know why?

A. Of carbon tet poisoning.

Q. Do you know whether he absorbed it by inhaling it or do you know whether he absorbed it by touch? Do you know yourself whether the gas masks were defective or whether the ventilation system was inadequate?

A. I know the gas masks were not defective.

Q. How do you know that?

A. Because the Police Department checked them after it happened.

[fol. 118] Q. Did you receive a report from them? Did you check them?

A. Check what, sir?

Q. The gas masks?

A. Well, I was using them.

Q. Did you know of your own knowledge whether the gas masks were defective? Do you know of your own knowledge?

A. No, I couldn't know until after I got the report.

Mr. Baker: At this time, your Honor, I would like to offer in evidence the hospital records of the Jersey City Medical Center.

I have shown them to counsel.

Mr. Mahoney: Yes.

(Plaintiff's Exhibit 16 received in evidence.)

ANGELO GNASSI, called as a witness on behalf of plaintiff, being first duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Dr. Gnassi, what are you connected with at the present time?

A. Jersey City Medical Center.

Q. And what is your position with the Jersey City Medical Center?

A. Chief pathologist.

Q. Doctor, did you make an autopsy of Mr. Halecki, the deceased in this case, at the Medical Center, Jersey City?

A. Yes, sir.

Q. And according to the hospital records, what is the final diagnosis?

A. Carbon tetrachloride poisoning, renal and hepatic failure.

[fol. 119] Q. What is meant by "renal and hepatic failure"?

A. That means the kidney failed to work and the liver failed to work.

Q. Doctor, did you perform an autopsy on this man after his death?

A. Yes.

Q. And will you tell us the date you performed it and the place where it was performed.

A. It was on October the 12th he died, 1951, at 3 o'clock, he died, p.m., and the autopsy was performed on the same day, at 5 p.m.

Q. And did you perform the autopsy, Doctor?

A. Yes, sir.

Q. And, Doctor, is the record on that autopsy also in these hospital records, attached to the hospital records marked Exhibit 16?

A. That's right.

Q. Doctor, you have your report there, have you not?

A. Yes, sir.

Q. What does it show as far as the final report which you submitted is concerned, with reference to your diagnosis as you made as a result of that autopsy?

A. Carbon tetrachloride poisoning.

Q. Is that your conclusion, Doctor?

A. Yes, sir. I have more than one conclusion.

Q. Go ahead. What is the rest of that?

A. Central necrosis of the liver.

Q. The central necrosis of the liver—

A. Yes?

Q. —was that due to the carbon tetrachloride poisoning, Doctor?

A. Yes, sir.

Q. Now, these various designations or findings that you have mentioned, Doctor, are they all related to the carbon tetrachloride poisoning which you mentioned at the beginning of your findings?

A. I believe so.

[fol. 120] Q. Well, in your opinion, with reasonable medical certainty, would you say that they are related to the carbon tetrachloride poisoning?

A. I have no doubt in my mind.

Q. Now, did you make a final conclusion as to the portions of the body which were affected by the carbon tetrachloride poisoning? I mean, using plain language so that the jury can understand it.

A. It is my belief that all the changes here were mentioned—the changes that were mentioned were due to carbon tetrachloride poisoning.

Q. And it affected principally what portions of the body?

A. Every change I mentioned was directly due to carbon tetrachloride poisoning.

The Court: That would be the liver, the kidney, the heart and the lungs?

The Witness: Yes.

The Court: And I think you mentioned the brain too?

The Witness: Yes.

The Court: You say the conditions which you described were all caused by carbon tetrachloride poisoning?

The Witness: Yes, sir.

ROBERT P. GAINES, called as a witness on behalf of the plaintiff, being duly sworn, testified as follows:

Direct examination.

By Mr. Baker:

Q. Where is your office located?

A. In the City of Bayonne.

Q. I called you Dr. Gaines. Am I wrong? Is it Mr. [fol. 121] Gaines?

A. Well, we have a Ph.D. in chemistry. The title really does not carry much weight.

Q. Well, what are you usually called? I want to know.

A. Well, it does not matter.

Q. What is your profession?

A. Bio-chemist with specialty in toxicology and public safety.

Q. Doctor, could you tell us first of all something about carbon tetrachloride?

A. Yes, I could.

Q. What is this substance and what is its effects and so forth?

A. I would like to know just at what level to place this. I don't know. But we can put it very elementarily and then go up, and if there is any confusion, it would be appreciated if I am stopped.

Q. Yes.

A. Chemically it is a member of the Methane series in organic chemistry, aliphatic series. It is a compound which has been substituted, in which the hydrogen atoms of methane have been substituted by atoms of chlorine, instead of the hydrogen, so it is the bottom member of this series. In other words, we could have a monochlor methane, a dichlor methane and trichlor methane, commonly known as chloroform, and the tetrachlor methane, or carbon tetrachloride. With respect to the physical properties—it is a liquid at ordinary temperatures, colorless, has a quasi-aromatic characteristic odor. It is about 1.54 in specific gravity, which means it is heavier than water. It boils at about 77 degrees Centigrade, so it is rather volatile. It has had quite a peculiar history as far as medicine goes. At one time it was believed to be of great help for elimination of worms from the alimentary tract, and was used in that respect as a medicine. Then it was found that the poor [fol. 122] patients received toxic results, and investigation showed that it was a toxic substance there and then. This use was eliminated and it became—for a while carbon tetrachloride was heard of very little until it was promoted as a fire extinguisher, especially where electrical devices are concerned, and the reason for it becoming very popular in that respect was the fact that it was a non-conductor of electricity, and so it became very popular.

But it was soon found that although the universal adoption of carbon tetrachloride as a fire extinguisher was quite popular and quite extensive, that in areas where it was used, confined areas, there was quite a number of poisonings. We knew very little about it, the mechanism of it at that time, and the theoretical approach to this situation was, perhaps a metal substance was acting as a catalytic agent, at high temperature, and the carbon tetrachloride striking these hot metal surfaces caused a break-

down of the compounds and gave off this phosgene, which had later become famous in its own nefarious way, the poison gas in World War I. But they attributed the poisoning by tetrachloride as attributable to the breakdown into phosgene. They did not consider carbon tetrachloride as being the poisoning agent. So the advocates of the carbon tetrachloride as the fire extinguishing agent put on their containers this warning: "To be used with adequate ventilation."

Research went on to see how much phosgene was created or generated, and it was found that very little phosgene was generated, that the poisoning effects were really due to the inhalations of the vapors of carbon tetrachloride.

There has been about the same time that this development took place—about the same time that this development took place it was found that carbon tetrachloride was an [fol. 123] real and economical and quite an efficient solvent for a number of industries, and especially where grease was concerned. That is, it would degrease, it would dissolve greases and fats without leaving any extensive damage or even any damage at all to the surfaces, and it was used that way in quite a number of industries, and even in the spotting industry—that is, in the laundry industry where cleaning of fabrics was done, and they had put out quite a few, spotless, and I think the popular, most popular was Carbona, which was nothing but carbon tetrachloride, and the lady folks and gentlemen would apply the Carbona to whatever fabric it was, and there was no harm at all because the area was extensive, the amount that was used was small. So carbon tetrachloride switched over from a fire extinguisher to that of a degreasing or solvent in use. As the uses of carbon tetrachloride became more prevalent in industry and in confined areas, it was found that a number of employees using the carbon tetrachloride in the degreasing operations would become ill and their first complaint was of nausea and gastric upset such as perhaps vomiting, and very little was understood about the toxicology of this substance at that time. So they started taking different precautions.

Q. When you say at that time, Doctor, about how many years ago was that?

A. About 1935—1930—'35.

Q. About 20 years or so ago?

A. Yes. Then it was found that the carbon tetrachloride could be used in industry providing adequate ventilation was provided, and then two studies were made about that same time. One study was to eliminate the hazards of carbon tetrachloride by diluting it down with fresh air.

At about the same time it was agreed by most of the public health authorities in the field that a concentration [fol. 124] of from 50 to 100 parts per million of carbon tetrachloride was in a safe area.

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Q. With reference to the carbon tetrachloride vapors as compared to air, what is the comparison?

A. $1\frac{1}{2}$ times heavier.

Q. Heavier?

A. Yes, so, if you expose a bottle of carbon tetrachloride, we will say, at a mid-point between the ceiling and the floor, you will find very little concentration in the upper strata, whereas down toward the floor you will have quite an accumulation.

Q. And the weight of the carbon tetrachloride, what is the weight of that?

A. 1.54 comparison to 1 for water.

Q. Therefore it is heavier than air, Doctor?

A. Yes, sir.

Q. And therefore you say it seeks a lower level?

A. Yes.

Q. Now, Doctor, with reference to toxicology, I guess you have told us all about that now?

A. I didn't discuss toxicology.

Q. Will you discuss the toxicology of carbon tetrachloride.

A. The first effect upon inhalation of the substance is that of an anesthetic, that is, it numbs the nerve endings and has a similar effect as you would had you been inhaling chloroform.

So after the inhalation for some time of this, depending upon the concentration in the air, we find that the lungs become saturated and the victim, or the experimental animal, is exhaling carbon tetrachloride as well as inhaling

it. In other words, the lungs are not absorbing it as rapidly as it does the oxygen of the air.

In the lungs going through it goes into the bloodstream and it is carried by the bloodstream into the liver. There metabolates are broken down and it is carried into the [fol. 125] renal system. The sites of injuries, therefore, in carbon tetrachloride poisonings, are in the lungs. We get hemorrhages in the liver, we get a breakdown of the hepatic cells, and in the kidneys, there we get a breakdown of kidney tissue.

Well, poisoning would come under two categories there: acute and chronic. The acute cases would be those wherein they are subjected to one exposure of an extensive amount, and then it is over with; that is, we will say ten minutes to a half hour later, and that is the end of it, and you don't have any more exposures to it, and in those cases you will have the same injuries but very, very slight, because there is no continued reabsorption of your poisonous substance, your carbon tetrachloride, and therefore that heals up very nicely.

But in a chronic, where you have daily or repeated exposure, there we have scar tissue resulting from the previous injuries, newly broken-down tissue, and by some peculiar means they build up a very slight tolerance toward this substance. In other words, an individual who has been exposed to carbon tetrachloride fumes or vapors for one week can stand a greater concentration upon subsequent exposures, and he gradually builds up a concentration that would almost kill instantly on acute exposure. Kill instantly on acute exposure.

Q. Now, Doctor, with reference to exposure or inhalation of carbon tetrachloride in an amount beyond the safe concentration, does it have a harmful and deleterious effect upon the human body?

A. Would you mind repeating the first part of the question?

(Question read.)

A. Obviously harmful and deleterious.

[fol. 126] Q. And, Doctor, you have told us that the safe concentration, in your opinion, was up to 100 parts per million?

A. I will say that that is the m.a.c. value today. That means maximum acceptable concentration. These figures, sir, do vary from time to time, but as of today, we will say as of 1956, if I may go back a few days into last year, the maximum acceptable concentration for carbon tetrachloride was 100 parts per million.

Now, there are many states and many compensation laws where the maximum is lower, is down to 75 and 50.

Q. What is your opinion?

A. My opinion on that is that 75 parts per million is much safer. In other words, in a lecture that I had given previously, in that lecture I had said that a concentration of 75 parts per million, in that concentration you can smell the carbon tetrachloride, and when you can smell the carbon tetrachloride, you know that you are about to go beyond your safe limits.

The Court: Why do you use the expression, as you explained it before, 100 parts per million, and 75 parts per million? When you are using that expression, what are you referring to?

The Witness: Weight per unit volume.

The Court: Weight per unit volume?

The Witness: Yes.

The Court: You had not explained that before.

The Witness: Your Honor, I thought I would try to give an analogy there of a grain per gallon of water. In fact, in reporting chemical concentrations in water for public health services we used either grains per gallon or parts per million. In other words, in the English system it is grains per gallon, and in the metric system it goes to per million, which is in terms of liters.

[fol. 127] The Court: That really reflects the concentration of strength, does it not?

The Witness: Yes. It is the concentration of weight per unit volume. That is really what it is. Whether it is a gas or a liquid, that is what it is.

Q. How is that measured? Is there a particular way of measuring that, Doctor?

A. Yes. You simply take a volume, go into atmospheric samples, for example, we take a measured volume of the

atmosphere into a metered container, it is analyzed, and your quantitative results are then translated into this system of parts per million, or milligrams per liter, or grains per gallon.

The Court: As a matter of fact, by excluding the duct system and the rest, is it correct to suggest that the number of parts per million had been decreased?

The Witness: Exactly, your Honor.

The Court: In other words, if you had excluded the various factors to which you referred immediately before we recessed for lunch, you would undoubtedly increase this figure?

The Witness: Exactly, your Honor.

Q. So that if you take into consideration that there are engines in this room of some size, or whatever it is, that would displace some of this room we have described to you, then the PPM would be increased over the 20,000 figure?

A. That's right.

Q. Now Doctor, we have indicated to you that in accordance with the evidence submitted here, and in accordance with the photographs, there was a ventilation system by ducts in the ceiling of this engine room in which air was being brought in to this engine room. What effect would [fol. 128] that have upon the concentration of carbon tetrachloride in that room?

A. That was covered indirectly in my introductory remarks this morning when I spoke about dilution. Introducing air from the upper level would act as a dilution of the air in the room. We had established on many occasions that you would have to bring in 225,000 cubic feet per minute to bring a concentration down to the safe level.

Now, the answer to your question, sir, would be, A, the effect would be that of dilution. Now, how much dilution, I would have to know how much air is being brought in.

Q. Well, what effect would it have upon the concentration of carbon tetrachloride?

A. Very little, sir, because the specific gravity of carbon tetrachloride is 1.54, that is in the liquid state.

Q. How about with reference to air?

A. The air was about five times. To be more exact, 5.3, using air as a standard of one, so you see that it is more than five times heavier than air, so it would sink to the bottom. Your greatest concentration then would be at the floor levels, and as you are venting from the upper strata, near the top of the room, your concentration would be diminished at that point.

Q. What effect would the blowing of air, as far as the concentration of carbon tetrachloride towards the lower part of the room have?

A. The blowing of air would merely act as an agitation to stir it up.

Q. Would it take out the carbon tetrachloride?

A. I question that it would take very little if any.

Q. With reference to an air hose which was placed near this man's face to blow the carbon tetrachloride away from his face, what effect would that have upon the concentration of the carbon tetrachloride?

A. That would act as an agitator. Whether it would have [fol. 129] any effect on the local concentration I question for this reason, because at the height of the man—I don't know how tall this man was but if you have a hose driving air at his head level, say five feet from the floor, that will circulate the air around this man's head and would therefore stir up the air, but the concentration itself would not be changed because he is shifting on one level. If it were directed upward or downward, thereby changing the concentration that way, it would be different, but if you are just blowing it across, you are replacing the air that you are blowing by air that has the same concentration of carbon tetrachloride vapors.

The Court: Well, supposing the fan were blowing the fumes of carbon tetrachloride away from him, you are giving a direction by the use of your hands across his face, and the testimony was that it was blowing it away from him.

The Witness: The fan, your Honor? I thought counsel had indicated that—

Q. Well, as I understand it, there was an air hose blowing it away from his face and also a fan.

A. Well, the fan would stir up and agitate your vapors, and then again I would have to ask, where is this fan?

Q. This fan was located on the floor of the engine room.

A. I should say that it would have very little effect, if any, on the changing of the concentration of the carbon tetrachloride in the room.

Q. Now, in addition to that there were some doors, two doors in the room which were kept open above the level of the floor, and there was an open transom over or on top of one of the doors. What effect would that have upon the concentration of carbon tetrachloride in this room?

[fol. 130] A. Very little carbon tetrachloride vapors would escape from the transom because most of the concentration is at the floor level.

About the doors, I don't see any pictures here of the doors, and I don't know—

Q. Well, they were located about six or eight feet above the floor.

A. That also would have very little effect because your concentration is at your floor level. That is your greatest concentration.

A. To get back to the use of the displacement of carbon tetrachloride, it is one of the best solvents that have been found to be just as efficient and more economical as Stoddard's solvent. Stoddard's solvent is being used, very fine. It has a number of the characteristics that carbon tetrachloride has, but no toxicity. Diethylene chloride is being used. There are quite a number of them. Then a number of these are used where there is no fire hazard to be considered, which is one of the things that made carbon tetrachloride so ideal until its toxic nature was discovered.

Q. And under what particular circumstances, in what areas is the use of carbon tetrachloride unsafe and dangerous?

A. I didn't quite get that.

Q. In what areas; in what particular places and areas is the use of carbon tetrachloride dangerous?

A. Well, the first prerequisite is ventilation, adequate ventilation, and if you conquer that, why, then it is all right. It has been for many years a household preparation.

Q. What about the use of carbon tetrachloride in confined areas? Is that a safe or dangerous practice?

A. In confined areas it is dangerous.

The Court: What do you mean by "confined areas"?

[fol. 131] The Witness: Any room where you do not have ventilation where the vapors, when they do accumulate, will gradually come down to the level of the individual using it so that he can inhale them. In other words, the vapors of carbon tetrachloride cannot and do not escape from the room when it is being used.

Q. What is the proper and effective method of ventilating the room where carbon tetrachloride is used? Where is the location of the ventilation, the type of ventilation?

A. Whereas carbon tetrachloride is heavier than air, at about five plus, three times heavier than air, adequate ventilation, proper ventilation can only be obtained from the lower level or floor level.

Q. And what type of ventilation, should it be air going in or air going out?

A. Exhaust, you want to remove.

Q. Exhaust. And where should that air be located with reference to the room, the location of the room?

A. You mean the duct?

Q. The ceiling.

A. No, the ventilating duct should be at the floor level.

Mr. Baker: At the floor level. Cross-examine.

Cross examination.

By Mr. Mahoney:

The Witness: Your Honor, I don't recall who the publishers are but I can communicate that information to your Honor if you wish me to—

A. (Continuing). — McNally on Toxicology, from Cook County, in that book made that observation in about 1920, [fol. 132] and then the next time it was repeated in the literature was in Brant's Industrial Hygiene.

Now, it so happens, sir, that this is the situation: Today we know that intoxication, alcoholism, impairs the storage of thiamin, vitamin B. Somehow or other carbon tetra-

chloride deprives the liver of its supply of vitamin B. Today we know that.

Five years ago we didn't know that, and studies are being made right along to find out the explanation as to why these things happen. Before this information was known they did say that an alcoholic is predisposed to sensitivity to carbon tetrachloride poisoning, but today we know that it is not because of the alcohol. He may have been deprived of his vitamin B supply by an entirely different thing.

For example, starvation could have caused it, avitaminosis diet, so if he has been deprived of his vitamin B supply and exposed to carbon tetrachloride, he is going to be hit by the effects much quicker and much more severely than an ordinary individual. So you see that it is not a question of alcoholism. I will grant you that when I studied that is what we were taught, but today we know that that is different. Today we know it is due to avitaminosis. Now, this condition can be caused by many factors.

Q. Within your experience, does not this vitamin deficiency generally follow a long period of chronic drinking?

A. We find the vitamin deficiency, sir, more marked during the drinking than after. In other words, it is not a question of whether a man is a chronic drinker or acute drinker, but when your blood level of alcohol is high, say about .20 milligrams per liter, per hundred cc, rather, of blood, why, then your vitamin B deficiency sets in. But [fol. 133] that has no relationship to whether the man is a chronic drinker or an acute drinker.

Q. Well, do I understand you to testify that there is a causal relationship between vitamin deficiency and a predisposition, that there is a causal connection between the vitamin deficiency and excessive drinking, is that right?

A. Yes.

Q. Is the relationship affected by the intensity of the drinking habit?

A. Sir, when you say "intensity," are you referring to how much is being consumed, or length of time involved?

Q. Well, both, Doctor.

Q. Well, both, Doctor.

A. Well, length of time we will rule out because, as I said, it is directly proportional to the alcoholic content of the bloodstream and your alcoholic content of the bloodstream will be high during the drinking process, up to three or four hours after your last drink.

Q. How about the volume?

A. The volume, sir—actually, if you are going to drink more, your alcoholic content of the blood is going to go higher.

Q. Doctor, I ask you to listen to this history contained in the hospital record of decedent, Plaintiff's Exhibit 16:

"Past history reveals that the patient is an alcoholic. He may be drinking one-half pint of whiskey per day for the past five months. Previous to this he drank two quarts of beer per day for ten years."

Now in the light of that history, Doctor, in your opinion was there a predisposition to carbon tetrachloride poisoning in this individual?

A. I don't think the question can be answered that way, sir. The man has been drinking over a period of years, so much whiskey, and that drinking would have caused damage [fol. 134] in the liver, but whether or not—what is more important is whether or not he was drinking on the day he was on the job.

By the Court:

Q. The Court will ask a question at this time. Of course, your answers were based upon the hypothetical information given to you when Mr. Baker questioned you. He described these various items of ventilation.

A. Yes, sir.

Q. And I take it to that extent, at least, your answer was based upon a hypothetical state of facts?

A. Limited within that, yes.

Q. Counsel just asked you whether or not you knew that

these various items were functioning properly and you said you didn't know? A. Of course not.

Q. I say to you now that the evidence in the case is that all these items were operating properly and functioning properly on the day in question. That is the testimony of Mr. Doidge. Would that make any difference in your answer as to the extent of concentration on that day in that area? I want to assure both counsel it is their duty to object to the question if it should be objected to.

Mr. Mahoney: No objection. I understand that is the evidence.

A. If his Honor pleases, I recall two doors being on the side at about eight feet above floor level. That door would be the only factor in the testimony or in the items introduced as being somewhat efficacious in removing the vapors, because that was low down, near to the floor.

The circulating fan would have no bearing on the removal of the vapors. It would merely act as a circulating agent. [fol. 135] The air hose, which was supplied near the operator's face, would have no effect at all on the diminution or the increasing of the concentration. I recall now an exhaust pipe sucking air out of this room, and I believe that would have—and I do say that—without any hesitation I say that that would be instrumental in diminishing the concentration in the room, but as to how much I cannot say.

I recall a hose near the ceiling as coming in with fresh air. That, sir, would be very little because it would be merely blowing in fresh air which would be increasing the concentration at the lower level.

Then the two skylights that are open again would have no effect on ventilation, but it would have on dilution because we must bear in mind, sir, that this vapor is more than five times heavier than air, 5.3 or .4. I said three times heavier before, and I meant five.

Therefore your concentration would be increased near the floor level and gradually increased as it goes up. I would say that all the items that were enumerated by both attorneys would have some effect, especially the doors and your exhaust. The others would have a negligible effect. Do I answer the question, sir?

Q. When you are talking of the exhaust, do you refer to the high compression blower?

A. That was sucking out.

• • • • •
Redirect examination.

By Mr. Baker:

Q. With reference to this blower, which we brought out was about eight foot above the floor and which was an exhaust—was that so situated and placed as to be effective in the withdrawal and reducing the concentration of carbon tetrachloride fumes in that room?

A. Well, it would be somewhat effective, sir, but the most [fol. 136] efficient place and the proper place for that to be would be at floor level, instead of eight feet high.

Q. So that, considering the location in which this blower was placed, would you say as to whether that is a proper or improper location?

A. I would say that it is an improper location.

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DEPOSITION OF JAMES F. HALEY

Mr. Baker: I would like to read extracts from a deposition of the defendant by its captain, James F. Haley, which was taken on February 11, 1954.

• • • • •
The Court: And this is evidence in the case as if the witness were actually on the stand testifying. Mr. Baker's associate is going to impersonate the witness.

Mr. Baker: Page 3.

“Q. Were you attached to the vessel New Jersey on September 29, 1951 or thereabouts?

A. Yes.

“Q. What was your position with that vessel?

A. I was captain.”

Page 4

“Q. Could you give us generally speaking what your duties were as master of the vessel?

A. Well, my specific purpose was to serve other ships supplying them with pilots and taking pilots off them as they were coming in and leaving New York Harbor.

"Q. Who composed the officers and crew of that vessel in September 1951?

A. Do you want their names?

[fol. 137] "Q. First give me their ranks.

A. We had a first mate, we had a second mate, and possibly on occasions a third mate.

"Q. And the crew, what did the crew consist of? How many were in the crew?

A. The crew consisted of a boatswain and approximately anywhere from seven to ten deck employees including A.B.'s and ordinary seamen.

"Q. How about the engine department?

A. The engine department consisted of the chief engineer, your first and second and third, with a day man and four oilers.

"Q. In September of 1951 were you, as master, as well as the officers and the crew, paid by the United New York & New Jersey Sandy Hook Pilots Association?

A. That is correct."

The top of page 5.

"Q. And you were employed by them?

A. That is correct.

"Q. Do you know where the New Jersey was on September 29, 1951?

A. September 29—that is the date you are talking about, is that it?

"Q. Yes.

A. It was in Rodermond Industries, Inc., Jersey City.

"Q. Do you know where that is located specifically in Jersey City?

A. No, sir.

"Q. Did you bring the vessel over to the Rodermond Industries, Inc. in Jersey City?

A. That is right.

"Q. What was the purpose of bringing it over there, if you know?

A. The annual overhaul, sir."

[fol. 138] Page 6, the middle of the page.

"Q. When you brought it there, was it brought by you and the officers and your complete crew?

A. That is correct, sir, and the Marine Superintendent was aboard, too."

"Q. When you say the marine superintendent, the marine superintendent of what company?

A. Of our organization.

"Q. Of your organization?

A. Yes.

"Q. That is of the United New York and New Jersey Sandy Hook Pilots Association?

A. At that time, yes."

Page 7:

"Q. What is his name?

A. Mr. G. J. Goetz.

"Q. Is he still with your organization, the United New York and New Jersey Sandy Hook Pilots Association?

A. He is an individual pilot.

"Q. What took place when you first brought the vessel into Rodermond Industries pier in Jersey City?

A. Well, as far as I can recollect, we went up to see the yard superintendent and also the different—what do they call them, various superintendents and snappers or bosses like they say in the shipyard. We discussed what we were going to do with the vessel."

Page 8, toward the bottom of the page:

"Q. During that period of time did you remain on board the vessel as the captain of the vessel?

A. Will you be more specific on that question? Remain how long?

"Q. Just tell me what you did in reference to the vessel.

A. We were moored in Rodermond Industries, and I was [fol. 139] on board every day during the working hours."

Page 9:

"Q. And what were the work hours?

A. From 7.30 until anywhere up to 5, 6 or 7 o'clock at night.

"Q. And that was every day while it was at the Rodermond Industries pier?

A. With the exception of week-ends, naturally.

"Q. During the period of time that you were aboard the vessel while it was at Rodermond Industries pier, during the working hours that you have described, what were your duties aboard the vessel or what did you do aboard the vessel?

A. Usually when you go into a yard like this you have a certain amount of deck work to do, like painting, and fixing up minor repairs, a general overhaul of the deck department, renew lines and take care of the general appearance of the vessel, the bridge, the galley, the mess-hall, your rooms, you paint them, and so forth.

"Q. Who would do that?

A. That would be the deck department.

"Q. You mean the deck department of the vessel?

A. Of the vessel.

"Q. That has nothing to do with Rodermond Industries?

A. No, sir.

"Q. So that during the time that the vessel was at Rodermond Industries, during that two-week period before and after September 29, 1951, did your entire personnel, officers and crew remain aboard the vessel during the working hours?

A. I will clarify that for you. No. Upon entering the shipyard we went in with a skeleton crew. Therefore our full complement of officers and crew were not aboard.

[fol. 140] "Q. During that period of time when it was in the Rodermond Industries yard, during that period around September 29, 1951, could you tell us what the skeleton officers and crew consisted of that remained aboard the vessel to the best of your recollection?

A. To my best recollection I had myself, who, as I recall, was the only officer in the deck department, and then I had approximately four or five deck men.

"Q. And the engine department?

A. We do not have anything to do as far as the engine goes. Do you want me to elaborate?

"Q. I will also ask you to go into the engine department, officers and crew of the engine department.

A. We had the full complement of engineers and engine room crew aboard.

"Q. During that period of time?

A. That is correct.

"Q. What were the engineers and the engine room crew doing in general aboard the vessel while it was in Rodermond Industries during that period of time?

A. They were maintaining the engines and any other specific work that we had to take care of.

"Q. Were they also present during the night hours, the engine department?

A. In some cases you would have men sleeping aboard the vessel at night.

"Q. During that period of time while the vessel was at Rodermond Industries shipyard did the engine department have an officer and crew during the night hours?

A. As a standby or as a watch? What do you mean by that?

"Q. Anyway at all.

A. Well, at night, yes. I will say that there was somebody that represented the engine department aboard the vessel on most of the occasions.

[fol. 141] "Q. I am talking about this particular period while the ship was at the Rodermond Industries.

A. At night they usually slept aboard the vessel at night, that is right.

"Q. You would say they had at least one officer of the engine department, one of the engineers aboard the vessel during the night hours during that period of time?

A. That is true. I would say during the work week, but on week-ends I wouldn't be too sure about it. Some days, some week-ends you would have them. Other week-ends you wouldn't have them.

"Q. With reference to the deck department, during the nighttime, what was done with reference to an officer of the vessel being aboard the vessel?

A. An officer on some occasions would stay aboard the vessel. However, it wasn't compulsory. But at all times we had a fire watch aboard the pilot boat New Jersey during that period that it was in Rodermond's shipyard.

"Q. Would you say that you did also have an officer aboard after the working day, during the night on behalf of the vessel?

A. I would say there was, you are referring to myself, I was the only officer on board. I would say on some particular occasions I did stay on board at night, but on the average it would be possibly maybe two or three nights a week.

"Q. And the officer who would be aboard would be you I understand?

A. That is correct.

"Q. When you weren't there during the evening hours that we described, would you have another officer of the vessel to take your place?

A. No, we just maintained a deck watch; it would be an AB, or one of the deck crew to stand as the watchman more or less as a fire watch."

[fol. 142] Page 13:

The Court: Will you suspend a moment, please, and give this to Mr. Cheney.

(Short pause.)

Mr. Baker: Page 13:

"Q. This deck watch would be someone that you designated?

A. That is correct.

"Q. He would be there after the working day?

A. That is true.

"Q. During that period of time while it was at Rodermond Industries pier, what were the duties of the deck watch as you instructed them?

A. His duties were to stay awake, keep alert at all times inspecting the vessel at various intervals to make sure that there wasn't any pilferage, and also any fire starting in the various sections of the ship.

"Q. Would you say that his duties were the same as your duties would be if you were there during the evening hours?

A. He was representing me."

Page 14, middle:

"Q. What was your job or what were your duties during that period of time when the Rodermond Industries were doing some repair work; what did you have to do with reference to the vessel while that repair work was going on?

A. Well, the repair work was represented by the marine superintendent who during the working hours inspected and went around the vessel to see that the different jobs were being done, and discussing the jobs with the snappers, and taking a general interest in that particular work that was being done by Rodermond Industries.

[fol. 143] "Q. And that person is Mr. Goetz of the United New York and New Jersey Sandy Hook Pilots Association?

A. That is correct."

Page 15:

"Q. Did you have anything personally to do with working with Mr. Goetz at all times checking the work as you have described it?

A. In some cases he would leave an odd job for me to check, and I would check it to see that it was done in good order and report to him upon completion.

"Q. Am I correct in saying that the odd jobs that you had to check would be some odd job of the Rodermond Industries that was being done aboard the vessel, to see whether it complies with the specification for repairs which they were to do?

A. Well, very seldom I would get a job like that, but in some particular cases we would take care of some small jobs. I never worked with the specs; that was Mr. Goetz's job, and he took care of all that work.

"Q. Did you check all of the work that the Rodermond Industries were doing during that period of time in September or thereabouts of 1951?

A. No, sir.

"Q. Could you tell us what you meant when you said if there was an odd job you would take care of it?

A. Well, like during the day when Mr. Goetz wasn't around, if there was any sand blasting of the hull which they were doing——"

Page 16:

"Q. Who is 'they'?

A. The employees of Rodermond Industries, I would go around and check to see if they were giving us a fair job; [fol. 144] how would you say that, our money's worth, to

see that they were doing the job properly in Mr. Goetz's absence. Then I would go around and make sure that the work was being carried out, being done.

"Q. And if you saw that the work was not being done properly by the employees of Rodermond Industries, what would you do about it?

A. I would report to Mr. Goetz.

"Q. Would this be during that period of time that Rodermond Industries was doing this work in 1951, as you recall?

A. Yes, sir.

"Q. Then during this entire time while Rodermond Industries were doing their work, their repair work, you have your own deck crew on the vessel doing certain maintenance work and painting work and so forth on board the vessel?

A. That is true, yes, sir.

"Q. Did your deck crew do that work only the five working days of the week, or did they do such work on Saturdays and Sundays, if you recall?

A. If it was necessary they would work on a Saturday or a Sunday.

"Q. Did your deck crew work on September 29, 1951, which was a Saturday?

A. I had one man there.

"Q. Who did you have there?

A. Walter Thompson.

"Q. What was his position?

A. He was to maintain a watch."

Now we will skip to page 27, middle of the page:

"Q. When you returned on Monday did you make a general inspection of the entire vessel?

A. Well, of my entire department I did.

"Q. That is the deck department?

A. That is right.

[fol. 145] "Q. When you made that inspection, just particularly what did you inspect, or generally?

A. To check the general appearance of the vessel, as the watch if anything went wrong, and if there is any work to be done by the watch I check that."

Page 29:

"Q. During the period of time that this vessel was in Rodermond Industries, during that period in September, 1951, if you found any unsafe conditions aboard, for instance some grease on deck, grease or oil on deck or some other unsafe conditions, would it be up to you as the captain of the vessel to see that those conditions were corrected?

A. Yes, and there was the boss snapper, and if he seen anything that was caused from the result of the negligence of any of his men he would correct it also.

"Q. But the maintenance of the decks was still under your jurisdiction while you were at Rodermond Industries?

A. Yes.

"Q. And the inspection of the vessel while it was at Rodermond Industries would also be under your jurisdiction?

A. Mine and the marine superintendent.

"Q. And if either you or the marine superintendent discovered any unsafe conditions aboard the vessel it would be up to you or him to see that they were corrected?

A. Well, naturally."

Page 30:

"Q. During that week-end of Saturday, September 29, 1951, and Sunday, September 30, 1951, when you left this Mr. Thompson upon the vessel, was his duty the same as your job, if you had stayed aboard the vessel, as the captain of the vessel?

A. His duties, to explain it in the vernacular, were primarily to act as a fire watch.

"Q. In other words, would you say he took over the job that you would ordinarily do as captain of the vessel? In other words, he took that over during that period?

A. He represented me in case anybody come looking for me, or he could call up with any situation that might arise of any importance.

"Q. Would you say that he actually took your place aboard the vessel, to do the work that you ordinarily would have done aboard the vessel during that week-end?

A. I do not see how he could take; you mean as the captain of the boat?

"Q. Well—

A. He helped me. I will put it this way, and if anything like I said before came up he would take care of the situation.

"Q. Was it up to him also to inspect the vessel during that period of time, over that week-end?

A. Naturally he had to go around and watch.

"Q. Make an inspection?

A. When you say inspection, what do you refer to?

"Q. Suppose you tell me.

A. The man was left there primarily for a fire watch, and that was his duty.

"Q. Was it also his duty in general to inspect and watch over the entire vessel during that weekend?

A. His duty was to watch over the vessel.

"Q. Was he to patrol throughout the vessel to see what was going on?

A. Spasmodically at different periods.

"Q. And if any special problems came up with reference to the vessel who would he have to get in contact with [fol. 147] during that week end?

A. He would have to get in touch with myself or the marine superintendent."

I see some cross-examination by Mr. Mahoney on page 32. I will just read a few lines:

"Q. Captain, can you tell me the purpose for which the ship was put into Rodermond Industries?

A. For the annual overhaul.

"Q. Just briefly what did that consist of?

A. That consisted of deck and engine work.

"Q. Repairs and overhaul?

A. Repair and overhauls, yes.

"Q. Was that work done under your orders?

A. No, sir.

"Q. To your knowledge was it done under any orders of any of the members of the Pilot Association?

A. Under the orders of the marine superintendent.

"Q. When you say under the orders of the marine superintendent, you mean in accordance with the specifications?

A. That is correct."

COLLOQUY

The Court: On this question of control which you just made reference to, do you feel that the Court must disregard the testimony that was just read into evidence as given by the captain of the New Jersey, James F. Haley?

Mr. Mahoney: The defendant contends that that does not establish control.

Under the cases, your Honor, there was a general duty on the part of the association personnel to see that the work was done properly and that the vessel was not damaged [fol. 148] aged, but, as your Honor has held continually throughout our discussions, there was no duty here to warn the decedent, and there is a great deal of testimony, both on the part of Captain Doidge and the witness that you just mentioned, that they had no supervision over the work being done, and they had no authority to direct the manner in which it was done, and, moreover, I think the law is, as cited in our brief, that there is no obligation and no responsibility for the manner in which the work done by a subcontractor is performed, and I respectfully refer you to the series of cases cited in our brief.

The Court: Well, there was direct testimony by Haley that the inspection of the vessel was under his supervision, and also under the supervision of the Marine Superintendent—that is, the Marine Superintendent of the defendant, and that they were to correct conditions, and that this applied to the protection of all men, including those who would be working on the ship as well as crew members.

Of course his statement in and of itself does not establish what the measure of the duty is on the part of the shipowner with respect to invitees working aboard the vessel.

The motion with respect to the negligence claim is denied.

Your other motion was with respect to the claim of unseaworthiness. What is the basis of the motion there?

Mr. Mahoney: As I stated, the defendant's motion to dismiss the claim of unseaworthiness is based on the position that the plaintiff has not established that the defendant [fol. 149] failed in any way to supply reasonable adequate equipment.

The Court: Call your next witness, please. This is the defendant's case. The plaintiff has rested. Now the defendant is going forward with its case.

WALTER C. THOMPSON, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Mahoney:

Q. By whom are you employed, Mr. Thompson?

A. United New York Sandy Hook Pilots Association.

Q. Will you speak up, please, so everybody can hear you?

A. United New York Sandy Hook Pilots Association.

Q. What is your occupation?

A. At present I am master of a pilot boat, Sandy Hook.

Q. Will you tell us, please, the nature of the Sandy Hook Pilots Association?

A. The nature of the business is to guide ships in and out of New York Harbor.

Q. Did you ever work aboard the Pilot Boat New Jersey?

A. I did.

Q. Is the Pilot Boat New Jersey still owned by the association?

A. It is.

Q. Would you tell us very briefly or describe for us briefly the Pilot Boat New Jersey?

A. She is 448 gross tons. She is on the style of a yacht and she is about 170 feet long.

Q. Were you employed by the association in September 1951?

A. Yes, I was.

[fol. 150] Q. What was your capacity at that time?

A. I was part of the deck crew.

Q. And, do I understand that you were not yet a pilot at that time? Is that correct?

A. That is correct.

Q. Did your duties require you to work aboard the Pilot Boat New Jersey?

A. Yes, it did.

Q. And briefly, what were your duties at that time?

A. Well, at that time I was new in the business. My main job was to do the painting and the cleaning up, and so forth.

Q. You were a deck man, in other words?

A. That's correct.

Q. Where was the Pilot Boat New Jersey on or about September 24, 1951, if you recall?

A. Rodermond Industries, New Jersey.

Q. Were you aboard the boat when it was taken in to Rodermond Industries?

A. Yes, sir, I was.

Q. And to the best of your recollection, was that on or about the 24th of September 1951?

A. Yes, it was around there, somewhere.

Q. Where is Rodermond Industries located?

A. In Jersey City.

Q. Was there a repair yard maintained at that place?

A. I beg your pardon?

Q. I said, was there a repair yard there?

A. Yes.

Q. Did Rodermond maintain a repair yard?

A. Yes.

Q. Where was the Pilot Boat New Jersey tied up at Rodermond?

A. Along the bulkhead.

Q. Was it in the water?

A. Yes, it was.

Q. Do you know approximately how long the boat was at Rodermond Yard?

A. Maybe three weeks, maybe, somewhere around there.

Q. And what was the purpose of the New Jersey being taken to Rodermond at that time?

A. For her annual repairs.

[fol. 151] Q. Tell us briefly what this annual overhaul or the annual repairs consist of.

A. Well, it consists of painting the boat, making minor repairs, changing the lines, working on the engine room, and so forth.

Q. This is done every year, is that right?

A. Yes, sir.

Q. Did you remain at work during the period of time when the boat was at Rodermond's Yard?

A. Yes, sir.

Q. What were your duties during that time?

A. Well, as I said, mostly to do the painting, cleaning up, mostly, on deck. In fact, it was all on deck.

Q. And was the boat in operation during that period?

A. No, sir.

Q. Was there any power supplied by the vessel itself?

A. No, all the power was supplied by shore power.

Q. And how is that power brought aboard the ship, if you know?

A. I know only just with a wire, right to the switchboard.

Q. Well, at any rate, you know it came from the shore, is that right?

A. Yes, sir.

Q. During the period of time between the 24th of September when the boat was brought into the yard and the 29th of September, were there other men working aboard the ship in addition to the ship's crew?

A. Oh, yes, from Rodermond Industries, men worked aboard.

Q. Turning your attention specifically to September 29, 1951, did you have any special duties on that day?

A. No, sir, I was just maintained as a fire watch.

Q. From whom did you receive your orders to work as a fire watch?

A. Well, at that time my orders were from Captain Haley.

Q. What orders did he give you?

A. To stay aboard the boat on Saturdays and maintain [fol. 152] a fire watch and make sure nobody came aboard the boat that wasn't authorized.

Q. What is a fire watch, Mr. Thompson?

A. Well, you just make sure the boat is covered and that there is no fire that breaks out anywhere. That is your main object.

Q. Did you actually work on the morning of September 29th?

A. Yes, I did.

Q. About what time, do you recall?

A. Well, our usual time is 8 o'clock, so it must have been around 8 o'clock.

Q. Was there any other member of the association working with you on that day?

A. No, I was aboard alone on that day.

Q. Was there any other member of the association in the yard or in the vicinity, as far as you know?

A. Not that I can recall, no.

Q. Was the New Jersey a dead ship on that day?

Mr. Baker: I object to the term "a dead ship." This is a conclusion.

The Court: Well, let him describe it.

Q. Did the New Jersey supply its own power on that day?

The Court: You have not answered. You answered it had not?

A. No, it did not.

Q. Did anyone come aboard the ship on the 29th?

A. Yes, there were some men working in the engine room.

Q. Do you know whose these men were?

A. All I know is that they were electricians, to my knowledge, from Rodermond.

[fol. 153] Q. Did you have any conversation with them when they came aboard?

A. Just that they told me they were going to work down in the engine room, that I was going to stay out of the engine room.

Q. Did one of these electricians state to you that you were to stay out of the engine room?

A. Yes, sir. They also told me not to let anybody else down there.

Q. Did you know either of these men by name?

A. No, I can't say I did.

Q. Did you see them aboard the vessel from time to time during the day?

A. Yes, sir, I did.

Q. Did you see them working at any time?

A. Actually working?

Q. Yes.

A. No, I did not.

Q. Were you in the engine room at any time during the day on September 29th?

A. No, sir.

Q. Did you supervise their work in any way, Mr. Thompson?

A. Could I supervise?

Q. Did you supervise the work in any way?

A. Oh, no, sir.

Q. Did you see them assemble the equipment that they worked with?

A. No, I did not.

Q. Did anybody else at all come aboard the ship on that day?

A. Not to my knowledge, no, I don't remember them.

Q. Did either of these men make any complaints to you about anything at all during the day of September 29th?

A. Well, at the end of the day one of the fellows just said he wasn't feeling well.

Q. Did either of these men make any complaints to you concerning the operation of the equipment or anything about the ship itself?

A. No, none at all.

Q. Do you have any knowledge of the nature of the work [fol. 154] that they were doing in the engine room, or did you have any at that time?

A. Only what they told me. Otherwise I had none.

Q. Did you receive any special instructions from any member of the association concerning the work that they were doing?

A. No, none at all.

Q. Were you authorized to give orders to anyone working aboard the ship?

A. No, I was not.

Mr. Mahoney: No further questions.

Cross examination.

By Mr. Baker:

Q. Mr. Thompson, you were part of the deck department, isn't that so?

A. That is correct.

Q. And that is entirely different than the engine department?

A. Yes, it is.

Q. And your superior in the deck department was who?

A. At that time it was Captain Haley.

Q. And he was the one who was your boss?

A. That's right.

Q. Aboard the vessel?

A. Yes, sir.

Q. Is Captain Haley in court here today, this morning?

A. Yes, sir, he was.

Q. Is he here now?

A. No, he is not here right now.

Q. Is he still your boss?

A. No, sir, he is not.

Q. And you took your instructions and your orders from Captain Haley while you worked on the New Jersey, is that right?

A. That is correct.

Q. And he placed you on this vessel on that particular Saturday, is that so?

A. Yes, sir.

Q. That is September 29, 1951, as we know it today?

A. Yes, sir.

Q. And when did he tell you that you were going to be [fol. 155] on the vessel on that Saturday?

A. Probably Friday.

Q. And were you working on the vessel that Friday?

A. Yes, I was aboard the vessel on Friday.

Q. And did you see the chief engineer aboard the vessel that Friday?

A. Yes, apparently he was.

Q. Could you give us his name?

A. The chief is Carl Ebling.

Q. Is he in court?

A. No, sir.

Q. And he was the chief engineer who was in charge of the engine department that day, is that correct?

A. That is correct.

Q. When I say "that day," I mean that entire week or during the entire time that the vessel was at Rodermond Industries?

A. That's right.

Q. Do you know whether he is still employed by this company, the United New York & New Jersey Sandy Hook Pilots Association?

A. Yes, he is.

Q. And did you talk to the chief engineer that Friday? That is the Friday before the Saturday.

A. I probably did. I don't recall exactly.

Q. And did he say anything to you about the work that was going to go on Saturday, the day that you were asked to be aboard the vessel?

A. Not that I can recall, no.

Q. Well, when the captain told you that you were going to work that Saturday, that September 29th, did he tell you what was to take place?

A. To my knowledge, no.

Q. And did you get any instructions from the captain as to what you were to do on that Saturday?

A. To maintain my regular fire watch?

Q. Any other instructions?

A. No, sir.

Q. Any specific instructions?

A. No, sir.

Q. And you have done that before, have you not?

A. Yes, sir, I have.

[fol. 156] Q. And you knew your duties that you were supposed to do?

A. That's right.

Q. What were your duties that particular Saturday?

A. To look around the boat, make sure no one came aboard, make sure there were no fires, or anything like that.

Q. And were you also to patrol around the vessel to see that everything was all right?

A. That's right.

Q. And if you saw any conditions that required any attention, whom would you report it to?

A. I would call either Captain Haley or Mr. Goetz.

Q. And who is Mr. Goetz?

A. At that time he was the Marine Superintendent.

Q. And is he still with the company, the same company?

A. Yes, he is.

Q. He is still the Marine Superintendent?

A. No, he is not the Marine Superintendent any more.

Q. What is he now?

A. He is an individual pilot.

Q. But at that time in September 1951 he was a marine superintendent, employed by the same company you were employed by, the United New York & New Jersey Sandy Hook Association?

A. Yes, sir.

Q. Did you see him on the vessel that particular Friday that you performed this work?

A. I don't recall if I did or not.

Q. And during that Saturday of September 29th, were you on the outside of the engine room?

A. Outside of the engine room?

Q. Did you patrol outside that engine room?

A. Well, I walked around the boat, yes, if that's what you mean.

Q. Your duties did not bring you into the engine room at all?

A. Not at all.

Q. You had nothing to do with the engine room at all?

A. Nothing at all.

[fol. 157] Q. Did you ever, on this particular day, look into the engine room, that September 29th, that Saturday?

A. Not to my knowledge, no.

Q. Did you know the work that was going on?

A. Only what they told me as during the day, during the course of conversation.

Q. And whom did you speak to?

A. The men who were working down there.

Q. And what did they tell you?

A. That they were working on the generators.

Q. And did they tell you what they were using?

A. I believe it was mentioned.

Q. And what did they say?

A. They were using carbon tet.

Q. And did you know at that time it was dangerous?

A. I had an idea.

Q. And you were specifically told to stay out, isn't that so?

A. That is correct.

Q. And to keep other people out?

A. That is right.

Q. These generators in this particular engine room—can you tell us what size they were, approximately?

A. You mean in actual size, or what?

Q. Yes, approximately.

A. Well, the generator itself is maybe about two feet in diameter, three feet. I never looked that close.

Q. That is in diameter—you mean the round part?

A. Yes.

Q. Now the entire engine there—how high (sic) wide and how high, approximately, if you can tell us?

A. The engine? I have no idea. I couldn't tell you.

Q. Well, would you say that these engines and generators occupied 50 per cent of the space in that engine room?

A. In the engine room itself?

[fol. 158] Q. Yes.

A. No.

Q. In the engine room?

A. No, they wouldn't occupy that much space.

Q. How much space would it occupy?

A. The engine is maybe about the size of the desk here, that's all.

Q. Is it a large engine?

A. Fairly large.

Q. How many engines did they have in that room?

A. Counting the mains and everything?

Q. Yes.

A. Four, I guess.

Q. In that same room, the whole room?

A. Yes.

Q. In this photograph marked Exhibit B—what do you call those, transoms, or what name do you give them?

A. We call it the hatch.

Q. What?

A. The overhead hatch.

Q. The overhead hatch?

A. And the skylights.

Q. And those skylights—is that over the upper engine room?

A. Yes, it is.

Q. Not the lower engine room?

A. No, it is what we call over the fiddling, over the upper engine.

Q. In other words, you have a lower engine room and then a stairway leading to the upper engine room?

A. It is just a deck, not an upper engine room there.

Q. These skylights are over the upper engine room?

A. Well, that's right.

Q. Not over the lower engine room?

A. That's right.

Mr. Baker: That's all.

[fol. 159] WILLIAM M. FINKENAUER, called as a witness on behalf of the defendant, being duly sworn, testified as follows:

Direct examination.

By Mr. Mahoney:

Q. What is your occupation, Mr. Finkenaure?

A. I am a ship's surveyor and consulting engineer.

Q. Are you a licensed marine engineer?

A. No, not seagoing. I am a licensed professional engineer.

MILTON HELPERN called as a witness on behalf of defendant, being first duly sworn, testified as follows:

Cross examination.

By Mr. Baker:

Q. Doctor, with reference to an autopsy, you performed, I know, many, many autopsies, don't you think the person or the doctor who makes the autopsy is in a better position to testify as to what that autopsy disclosed than any other person that would look at a report?

A. Well, I am accepting what the findings were in the autopsy. I don't think there is any disagreement in the autopsy findings as to the cause of death.

The Court: The autopsy diagnosis was death from carbon tetrachloride poisoning. You are in agreement with that?

The Witness: Yes, sir.

The Court: I think everybody is in agreement on that. [fol. 160] Is there any question about that?

Mr. Mahoney: The defendant does not take issue with that, your Honor.

Q. I am talking about the individual findings as to the various portions of the body, the liver, for instance.

A. Certainly, the person who saw the liver saw it, and I have to take his language and interpret that. But I am assuming that he saw a liver showing the effects of acute carbon tetrachloride poisoning. I have accepted his findings.

Q. Now, was there from the autopsy report which you have examined any cirrhosis of the liver?

A. No.

Q. No question about that?

A. That's right.

Q. And from the autopsy findings as you examined them was there any evidence of any alcoholism?

A. (No response.)

Q. Is there anything like that in the report?

A. No, there isn't anything in the report that mentions alcoholism. There is no reason why the report would men-

tion that unless it had a positive finding to that effect, but there are many effects of alcohol that are not evident in an autopsy report.

Q. Well, would you be willing then to accept the statement of the man who made the autopsy, assuming he is qualified, rather than a person who just examines the report? Would he be more in a position to know the situation?

A. No, he would be in a better position to describe the color of the organ, but it doesn't necessarily follow that his conclusion is correct. It doesn't follow necessarily, because a man makes observations, that his conclusions are correct.

Q. You are not sure yourself anyway, are you?

A. What do you mean I am not?

Q. You are not sure yourself?

A. No, frankly—

[fol. 161] Q. With respect to alcoholism?

A. Yes, I would not insist on that interpretation, not having seen the liver.

Q. I think you have indicated that there is no question that from examination of this hospital record, marked for identification P-16, that this man sustained his death by reason of carbon tetrachloride poisoning?

A. That's correct, yes.

Q. And by inhalation of carbon tetrachloride poisoning?

A. I think that is a reasonable conclusion, yes.

WILLIAM M. FINKENAUER resumed.

Direct examination.

By Mr. Mahoney (resumed):

Q. In your opinion, was that system adequate to remove carbon tetrachloride from the engine room?

A. In my opinion it was not.

Q. And why do you say that, Mr. Finkenaar?

A. I don't see how you could expect any ship's ventilating system to take care of those noxious gases that are introduced, and particularly those that are heavier than air and lie down near the bilges. You would have to have a special blowing device to stir that air up and permit it to circulate out with the rest of the exhausted air.

Mr. Mahoney: The defendant at this time renews the motion for a directed verdict on the ground that there has been a complete failure of proof in establishing either that the defendant showed lack of care in any regard in [fol. 162] so far as the negligence cause of action is concerned, and, moreover, that there has been no testimony based on factual evidence that the defendant failed to supply the decedent with a safe place in which to work.

The Court: If anything, the case, in my opinion, is in the posture now so that it is much stronger than it was at the close of the plaintiff's case. You have had your own expert testify that the ventilating system of the ship was not adequate to remove carbon tetrachloride. I think this must be taken into account together with the fact that the shipowner in this case designated and specified carbon tetrachloride as the substance to be used in cleaning the generators.

Mr. Mahoney: Your Honor, in view of the line of cases which provide that the defendant is required to supply only equipment reasonably suited for the purpose for which it was designed, the defendant submits that it would be extremely unreasonable and not within the intention of the line of cases on unseaworthiness to require the defendant to supply a ventilation system adequate to remove every conceivable substance that might be used in that compartment. Specifically, carbon tetrachloride being a substance heavier than air, and not a substance designed for general use in a compartment of this type, the defendant submits that there was no obligation on its part to do more than supply reasonably adequate equipment, and that the decedent and his employer brought aboard the vessel additional devices with the knowledge that no ventila-

tion system aboard the vessel was adequate to remove that substance.

[fol. 162A] The Court: Your statement up to the last moment was all right as far as it went. In other words, you are recognizing that the ventilating system of the ship was inadequate to remove carbon tetrachloride, and I am sure that there is no point to argue or disagree with you that a ship perhaps ordinarily is not required to have a ventilating system that could remove a poison of that type which is rarely used. The moment that you specify carbon tetrachloride as the chemical to be used in cleaning the generator, and it was known that it was a dangerous substance, then there was a duty certainly to see that the ventilating system was supplemented and aided by other methods of withdrawing the fumes, and that presents the basic question in the case, it seems to me. Whether the ventilating system both that which was part of the ship regularly and that which was brought in as auxiliary equipment constituted a sufficiently adequate system in order that the men might work there with reasonable safety.

I hold there is a question of fact for the jury to pass upon. Your motion is denied.

[fol. 162B]

ABSTRACT FROM EXHIBIT P-5

RODERMOND INDUSTRIES INC.

Foot of Henderson Street,
Jersey City, N. J.

Sept. 24th, 1951

W. O. #4190

Pilot Boat "NEW JERSEY"

Yard

a/c N. Y. & N.J. Pilots Association

24 State St., N.Y.C.

LIST OF REPAIRS

ITEM

1 Furnished necessary Drydocking to complete under-water work. Shifted all bilge blocks and painted the bare spots with two (2) coats of apexior paint.

2 PORT & STBD GENERATORS

Crew to remove and replace the 8 cylinder heads for the port and stbd. generators.

Contractor to remove the eight (8) heads to the shop, disassemble same, grind in the valves, thoroughly clean out the heads, reassemble and return to vessel. Stone commutators to remove high spots and ridges and cut clean to mica all segment bars. Clean and adjust brush riggings and brushes.

Spray clean with carbon tetrachloride the armature and field windings to remove all traces of dirt and film. Close up and prove in good order.

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[fol. 163]

IN UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 94—October Term, 1957.

Argued November 21, 1957

Docket No. 24551

ANNA HALECKI, Administratrix *ad Prosequendum* of the
Estate of Walter Joseph Halecki, deceased, and ANNA
HALECKI, Administratrix of the Estate of Walter Joseph
Halecki, deceased, Appellee,

v.

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION, a corporation and UNITED NEW YORK SANDY
HOOK PILOTS ASSOCIATION, a corporation, Appellants.

Before:

HAND, HINCKS, and LUMBARD,

Circuit Judges.

Appeal by the defendants from a judgment of the District
Court for the Southern District of New York in favor of the
plaintiff in an action to recover damages for the death of
the decedent in the State of New Jersey because of the
negligence of the defendants and of the unseaworthiness of
a pilot boat on which he was employed. Affirmed.

[fol. 164]

OPINION—Decided January 10, 1958

HAND, *Circuit Judge*:

This appeal is from a judgment for the plaintiff entered
on the verdict of a jury, awarding damages for the death

of the plaintiff's decedent while engaged in cleaning the pilot boat, "New Jersey," belonging to the defendants. The complaint was based upon two counts; one for negligence and the other for unseaworthiness, and four errors are alleged. First, that the evidence was not sufficient to justify a verdict on either count. Second, that the court erred in submitting to the jury any question of seaworthiness. Third, that the court should have charged the jury that under the New Jersey Death Statute contributory negligence was a bar and not a limitation upon damages. Fourth, that the defendants should have been allowed to show that the plaintiff had made inconsistent allegations in another and pending litigation.

On September 22, 1951, the "New Jersey," a pilot boat, was moored at a pier in the repairyard of Rodermond Industries, Inc., North River, Jersey City, for annual overhaul and repairs; the only employee of the defendants on board was a watchman. Part of the work was to clean the ship's generators which had become fouled in use, and Rodermond Industries subcontracted this part of the job to K. & S. Electrical Company, the employer of the decedent, Halecki. On the 28th he and Doidge, a fellow worker, set up the necessary equipment on the boat. Since she was at the time without any electrical current, it was necessary to bring in current from the shore. The generators were cleaned by spraying them with carbon tetrachloride, a volatile liquid, which will "remove all traces of dirt and film," [fol. 165] but whose fumes, unless their density is carefully controlled, may be deadly. The generators were in the ship's engine-room, one deck below the main deck, and Doidge and the decedent sought to protect themselves during the work, (1) by using gas masks, and (2) by bringing two "air hoses" and a "blower," actuated by the current from the shore. One hose was used to spray the tetrachloride upon the generators; the other, to blow in fresh air from the outside. The "blower" was set at the bottom of the engine-room near the generators, and from it led an exhaust pipe to an open door about eight feet above. In addition, the ship's permanent ventilating system was set in action by the outside current; it consisted of some fans and "vents" at the top of the engine-room through which air was drawn in. Thus,

means of exhausting the contaminated air consisted of (1) the hose that was not used to spray, (2) the "blower," and (3) the increase of air pressure resulting from the intake of the ship's own ventilating system. Besides this, an open door and an open skylight led to the air. A biochemist, familiar with the use of tetrachloride, after being told in detail the size of the engine-room and the apparatus installed, gave as his opinion that the ventilating system in the engine-room, even when supplemented by the apparatus brought on board and installed by Doidge and the deceased was not "adequate to remove the fumes." The competence of this expert to give an opinion was so much within the discretion of the trial court that only in a clear case should we overrule its decision.¹ The state law of evidence is no longer the final test of the admissibility of evidence.

As we have said the case was left to the jury in a double aspect: (1) whether the defendants had been negligent in furnishing the deceased as a "business guest" with an unfit [fol. 166] place to work, and (2) whether the ship was unseaworthy vis-a-vis a shore worker who came aboard to take part in the annual overhaul. It is obvious therefore that the plaintiff's evidence had to support a verdict on both claims; for we cannot know that the unsupported claim was not the one on which alone they brought in their verdict. As to the claim based on negligence, so far as the defendants mean to argue that the engine-room, equipped as it was, was a reasonably safe place in which to work, we hold that the evidence created an issue that could be decided only by a verdict. The deceased was certainly an "invited person," or "business guest," and the shipowner was liable, not only for the negligence of the master,² but, although the work was let out to a subcontractor, also for any lack of "reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let,

¹ *United States v. Miller*, 61 F. 2d 949, 950 (C. A. 2); *Tucker v. Loew's Theatre & Realty Co.*, 149 F. 2d 677, 679 (C. A. 2); *Trowbridge v. Abrasive Co.*, 190 F. 2d 825, 829 (C. A. 3); 2 Wigmore, §561.

² *Leathers v. Blessing*, 105 U. S. 626, 630.

or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities." ³ Being charged with knowledge that so dangerous a substance as tetrachloride might be used, it was proper to leave to the jury whether the "methods and manner" of its use were proper. So much for the negligence count.

Quite a different question arises as to the warranty of seaworthiness, for, if that attached, it imposed an absolute liability, if the engine-room was not properly equipped. Although in a very scholarly analysis of the earlier decisions, it has been recently argued that the maritime law did not impose such a warranty in favor of seamen,⁴ rightly [fol. 167] or wrongly the opposite doctrine has become so firmly settled since *The Osceola*, 189 U. S. 158 (1902) that we decline to reconsider the question. All that is left for us on this appeal is whether the warranty of seaworthiness extended to the decedent although concededly he was not a seaman, but as we have said, a "business guest" on a vessel within the navigable waters of New Jersey. In *Guerrini v. United States*, 167 F. 2d 352 (C. A. 2), the ship, as in the case at bar, was moored in Brooklyn alongside a dock, and the libellant, an employee of a subcontractor, was engaged in cleaning her boilers and tanks, when he was hurt by slipping on a grease spot. We held that the doctrine of *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, did not apply. However, that was in 1948 before either *Pope & Talbot v. Hawk*, 346 U. S. 406 or *Petterson v. Alaska S.S. Co.*, 347 U. S. 396, was decided: it is now clear that we were wrong both in limiting the warranty to those doing longshoremen's duties and in supposing that the surrender of "control" of the ship was relevant. We can see no distinction between the work of the decedent in the case at bar and that of the plaintiff in *Pope & Talbot v. Hawk*, *supra* (346 U. S. 396), which was carpenter's repair work. We think that the test is whether the work is of a kind that traditionally the crew has been accustomed to do, and as to that it makes no

³ Restatement of Torts, Vol. II, §344, Comment b.

⁴ "Seamen, Seaworthiness and the Rights of Harbor Workers," Francis L. Tetrault, 39 Cornell Law Quarterly, 381.

difference that the means employed have changed with time, or whether defective apparatus was brought aboard and was not part of the ship's own gear. Since the deceased was cleaning the ship, we hold that it was within the doctrine of *Pope & Talbot v. Hawk, supra*.

As might be expected, so shadowy a line of demarcation will in application produce inconsistent results. For example, in *Read v. United States*, 201 F. 2d 758, the Third Circuit held that the warranty extended to a "business guest" who was doing part of the work of changing a "Liberty" ship into a transport, while the Ninth Circuit in [fol. 168] *Berryhill v. Pacific Far East Line*, 238 F. 2d 385, cert. den. 354 U. S. 938, refused relief to a workman who was engaged in "major repairs," as these were described in the District Court (138 Fed. Supp. 859). In the appeal in *Berge v. National Bulk Carriers, Inc.* (148 Fed. Supp. 608), decided herewith, we shall state the reasons that impel us to prefer the decision of the Ninth Circuit, but it is not necessary to pass on that question here, because as we have said, the work did not involve any structural changes in the ship, but was of a kind that was part of the crew's work, not only at sea, but when she was laid up for general overhaul. We start therefore with the conclusion that it was proper to leave to the jury, not only the issue of negligence, but that of unseaworthiness.

That does not however answer two other objections: (1) that the plaintiff is not the decedent, but an administratrix, and (2) that the judge left the decedent's contributory negligence to the jury, not as a bar, but only in limitation of damages. It is common ground that the liability for breach of the warranty of unseaworthiness does not survive under the maritime law (*The Harrisburg*, 119 U. S. 199; *Lindgren v. United States*, 281 U. S. 38). As to the maritime tort, §33 of the Merchant Marine Act of 1920 (Title 46, §688) gave to "the personal representatives" of a deceased seaman the same remedies that the deceased would have had, had he lived. However, in the case at bar the deceased was not a seaman, so that upon both counts the plaintiff must resort to the "Lord Campbell's Act" of New Jersey which provides in general terms: "When the death

of a person is caused by a wrongful act, neglect or default such as would . . . have entitled the person injured to maintain an action for damages . . . the person who would have been liable . . . shall be liable in an action [fol. 169] for damages." Much controversy has arisen over the scope of the phrase just quoted, making the liability to the next of kin depend upon an "act, neglect or default" of the putative obligor. When the question arose in the Third Circuit whether these words covered a breach of the warranty of seaworthiness, the court *in banco* by a vote of four to three held (*Skovgaard v. The Tungus*, December 23, 1957) that they did. In spite of the zeal with which the contrary has been argued, we think that the majority was right. *Graham v. Lusi*, 206 F. 2d 223 (C. A. 5) does not actually hold the contrary; though that may have been the court's opinion. Its decision was based solely on the point of contributory negligence, and did not pass upon the ruling of the district court that the libel could not rest on breach of warranty. *Lee v. Pure Oil Co.*, 218 F. 2d 711 (C. A. 5) held that, even vis-a-vis the deceased, there was no breach of warranty, and then went on to say that in any event his administratrix could not recover. The report does not tell us what was the language of the Tennessee statute; but if it was the same as that of New Jersey, we are not persuaded. We hold that "neglect" and "default" both cover a breach of the warranty.

There remains, however, the further question: i.e., whether contributory negligence is an absolute defense. Before the decision of the Supreme Court in *Pope & Talbot v. Hawn*, *supra*, it had been generally held that when a seaman before the Merchant Marine Act of 1920, or a shoreworker thereafter, had been killed because of the negligence of the ship's crew in the navigable waters of a state having a local Lord Campbell's Act, contributory negligence was a bar to an action by his next of kin. This was as true when the suit was in the admiralty as in a court of the state; in short, the bar arising from contributory negligence was an incident of the liability imposed by the state, [fol. 170] no matter where suit upon it was brought.* In

* *Robinson v. Detroit V. C. Steam Navigation Co.*, 73 F. 883 (6th Cir. 1896); *Quinette v. Bisso*, 136 F. 825 (5th Cir. 1905); *O'Brien*

Pope & Talbot v. Hawn, supra, however, the Court held that contributory negligence was not a bar to an action at law by a "business guest," but only limited his damages, and this we read to mean that rights arising from faults that occur in navigable waters are exclusively the creation of maritime law, and are exempt from the defense of contributory negligence whether suit upon it is in the admiralty or in an action at law, state or federal.⁷ The following language we take from the opinion of the majority in that case, pages 409, 410: "the right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawn were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies a state may not deprive a person of any substantial admiralty rights as defined by acts of congress, or interpretative opinions of this Court." Although, as we have said, we are not dealing with "federal maritime law," we should remember that so far as we can we ought to construe the statute so as to avoid capricious and irrational distinctions. We leave open whether New Jersey is without power to take as much or as little of the rights "rooted in federal maritime law" as it chooses as the model for the right it confers upon the next of kin; but the courts of that state have never passed upon the question, and to deny the exemption to the next of kin seems to us to the last degree capricious and irrational. Although it was only a dictum, [fol. 171] the First Circuit in *O'Leary v. United States Lines Company*, 215 F. 2d 708, 711, declared that "it would be incongruous to hold in conformity with *Pope & Talbot v. Hawn, supra*, that the maritime law determined the respective rights of the parties in the event of personal injuries short of death, but that state law determined their rights in the event of injuries resulting in the ultimate consequence

v. Luckenbach S.S. Co., 293 F. 170 (2d Cir. 1923); *Klingseisen v. Costanzo Transp. Co.*, 101 F. 2d 902 (3d Cir. 1939); *Graham v. A. Lusi*, 206 F. 2d 233 (5th Cir. 1953); *The A. W. Thompson*, 39 F. 115 (S. D. N. Y. 1889 per Addison Brown, J.); *The James McGee*, 300 F. 93 (S. D. N. Y. 1924).

⁷ *Cf. Garrett v. Moore-McCormick Co.*, 317 U. S. 239.

of death." We are aware that *Curtis v. Garcia*, 241 F. 2d 30, 36 (C. A. 3) is to the contrary, but as neither it nor *O'Leary v. United States Lines Company*, *supra*, is authoritative, we are free to choose. Obviously, the answer is not certain; we must do as best we can with what we have, and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar.

Finally, the defendants complain that the judge refused to allow them to prove that the plaintiff in another action had asserted that Rodermond Industries had control of the vessel. Even though this were an error—on which we do not pass—obviously it was not of enough importance to reverse the judgment.

Judgment affirmed.

LUMBARD, Circuit Judge (dissenting):

I cannot agree that we must subscribe to the principle that a shore-based worker who performs any labor on a ship, even though the ship is out of operation and tied fast to a dock for overhaul, should have extended to him a warranty of seaworthiness merely because the work which he is doing can be generally characterized in terms of the duties which a seaman could be expected to perform. It is not enough to categorize Halecki's work as cleaning ship's equipment. Here the inescapable fact is that Halecki, in [fol. 172] spraying the generators with carbon tetrachloride, was doing something which a seaman could not do, which no seaman had ever done, and which would expose the seaman's life to serious danger if he even attempted it.

A summary of the evidence showing how the generators were cleaned by spraying with carbon tetrachloride shows the absurdity of assimilating this work to that of a seaman or of saying that the work "is of a kind that traditionally the crew has been accustomed to do."

On Saturday, September 22, 1951 the pilot boat "New Jersey," owned by the appellants, was turned over to Rodermond Industries, Inc. for its annual overhaul and inspection. It was moored at the Rodermond repair yard pier at the foot of Henderson Street, North River, Jersey City,

New Jersey. A list of repairs, prepared by Rodermond the following Monday, September 24 provided that the crew was to remove and replace the eight cylinder heads for the port and starboard generators, and the contractor was to do some work on the cylinder heads. Under the same heading "Port & Star Generators" it was provided:

"Spray clean with carbon tetrachloride the armature and field windings to remove all traces of dirt and film. Close up and prove in good order."

Rodermond in turn subcontracted with Halecki's employer, the K & S Electrical Company, to do certain electrical work and to spray the generators with carbon tetrachloride, since neither ship nor shipyard was equipped or competent to do this work. The K & S foreman, Donald Doidge, was at work on the New Jersey from Monday, September 24, and on that day he consulted with the New Jersey's chief engineer as to when the spraying should be done as "we know it has to be done when there is nobody else on board ship." Doidge agreed with the chief engineer [fol. 173] that it should be done on Saturday during the absence of the crew, since during the week members of the crew were working on the ship.

Pursuant to these arrangements, Doidge and Halecki made preparations on Friday for the Saturday spraying. Doidge, the shop foreman, had been an electrician for about 25 years and Halecki had worked with him for about 6 years. Not all their work was on ships; they cleaned generators by carbon tetrachloride spray in factories and buildings, wherever the generators were. On Friday they brought on board extra air hoses and a blower belonging to Rodermond. One air hose was used for the spray gun and the other was used underneath the generator as an exhaust to blow the fumes away from the man spraying. A high compression "blower" was placed so that it would exhaust foul air out through one of the two open doorways.

On Saturday morning, September 29, according to the previous arrangement, Doidge and Halecki came aboard to do the spraying. They found only the defendant's watchman, Walter C. Thompson, and they told him to stay out of

the engineroom and not to let anybody down. They brought with them three gas masks belonging to K & S Electric Company. Halecki wore a gas mask and did most of the spraying 10 to 15 minutes at a time with intervening rest periods of equal length. All the equipment for exhausting the fumes and the ship's ventilating system were in operation and run by power supplied from generators on shore. Halecki took sick the next day and died two weeks later. There was sufficient evidence to support the jury's finding that death was caused by carbon tetrachloride poisoning.

Despite history and logic, the trend of decisions in cases involving injuries and death on navigable waters, now further extended by my distinguished colleagues, seems to be guided by what Justice Rutledge has frankly called a "humanitarian policy." *Seas Shipping v. Sieracki*, 328 U. S. [fol. 174] 85, 95 (1946). This policy seems to be based on the theory that judges are competent to determine that it is better that the shipowners should assume all the burdens because they are able to average them out through insurance or some form of protection against all the hazards of accident which may occur on shipboard to anyone coming on board. The result has been a progressive expansion, both qualitative and quantitative, in the duties and liabilities imposed upon shipowners.¹ From a concept resting on negligence, seaworthiness has, by judicial development, become an absolute duty imposing liability without fault. From a duty running to those we traditionally consider as seamen, exposed to the hazards and discipline of the sea, it has been expanded to include a multitude of harbor workers who report for work in the morning and return to their homes at night. The burdens of proving lack of due care and of defending against the bar of contributory negligence are jettisoned by this judicial legislation. Where there is the slightest support for causation the only question for the jury is the amount of damages.

¹ See Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 Cornell L. Q. 381 (1954); *The Tangled Seine: A Survey of Maritime Personal Injury Remedies*, 57 Yale L. J. 243, 252 (1947); Gilmore and Black, *The Law of Admiralty*, 315-324, 358 (1957).

It may be argued that the initiative taken by the federal courts in imposing absolute liability is justified by their peculiar historical responsibility for admiralty law. And we are told that certain harbor workers come within the ambit of the warranty of seaworthiness because a shipowner cannot escape liability by delegating to others what is traditionally seamen's work. *Seas Shipping v. Sieracki*, 328 U. S. 85, 95 (1946). Here we go further. When a lower court charges on both seaworthiness and negligence toward a business invitee, we must assume that the only justification for the charge on seaworthiness is that the shipowner may [fol. 175] be found liable despite his own due care. By assimilating certain activities to maritime law, we extend the absolute liability of shipowners, in effect, beyond the shipyard gates. The owner, despite the utmost care, is liable for the activities of a specialist employed expressly because these activities were beyond the range of experience and competence of the ship's crew. These circumstances rebut the contention that the shipowner is nullifying his liability by parcelling out ship's work to others.

The anomaly of the result reached here is pointed up when we consider the restricted liability of the specialist's employer, who is in the most favorable position to reduce the incidence of injury. Unlike the shipowner, the immediate employer's liability is restricted to the insurance expenses of workmen's compensation or to damages incurred due to his lack of due care. Although the shipowner was not Halecki's employer and this was essentially an industrial injury resulting in the death of a shore-based electrician, an absolute liability of judicial creation is imposed upon the shipowner above and beyond the system developed by New Jersey to compensate for industrial accidents. I had thought that such far-reaching changes in rights and legal duties were solely within the province of the elected representatives of the people in Congress and not the proper business of judges. The traditional responsibility of the federal judiciary for admiralty does not justify such an expansion of liability.

Halecki risked all the hazards of the sea as one might experience them on a Saturday in late September while the ship was made fast to a bulkhead in Jersey City. He

was not a seaman, he was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed. Whatever reasons there may be for extending the warranty of seaworthiness to stevedores or other harbor workers who work on board, they [fol. 176] do not apply to those employed to do a special job of such a dangerous and unusual nature that it is beyond the competence of ship and shipyard, necessitates the removal and exclusion of the crew, and requires bringing extra equipment aboard for the safe performance of the hazardous activity.

The case of *Berryhill v. Pacific Far East Line*, 238 F. 2d 385 (9 Cir. 1956) cert. den. 354 U. S. 938, is authority for the proposition that when the manner of doing the work is foreign to what the ship's crew could do and involves the use of equipment not used or known on ships, there is no warranty of seaworthiness running to those who are injured in the course of doing such work by reason of any defect in the equipment so used. In that case the plaintiff was injured by the shattering of a grinding wheel brought on board by his employer, Todd Shipyards Corporation, for use in repairs being made on the "shaft keyway" on defendant's ship. The Court of Appeals held there was no warranty of seaworthiness with respect to the grinding wheel. Judge Barnes pointed out that to hold otherwise would go beyond the *Sieracki*, *Hawn* and *Petterson*² cases as the grinding wheel was equipment that the ship could do without, and the shipowner may never have had any reason to know that such equipment existed. That the kind of equipment used is foreign to the vessel is just another way of saying that the work done is not the kind of work normally done by seamen.

My brothers say that this work was merely cleaning a generator and, as cleaning propulsion machinery is the kind of work which seamen would normally do, cleaning a generator is seamen's work and those who do it are en-

² *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946); *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406 (1953); *Petterson v. Alaska S. S. Co.*, 205 F. 2d 478 (9 Cir. 1953), aff'd per curiam 347 U. S. 396 (1954).

titled to a warranty of seaworthiness. This assimilates [fol. 177] spraying with carbon tetrachloride to all cleaning as if it were harmless and commonplace; it is a play on words which by a characterization avoids dealing with a difference in means which completely destroys the validity of the syllogism. Because seamen may be able to do some kind of cleaning does not make seamen of those who do another kind of cleaning which seamen have never done and cannot do; nor does it supply any reason why an outside specialist should be treated, or needs to be treated, like a seaman.

That such general characterization is not a solution is emphasized by *Berge v. National Bulk Carriers Corp.*, decided this day. There the same panel of this court holds unanimously that there is no warranty of seaworthiness to a rigger, engaged in installing a tank bulkhead in the course of rebuilding a vessel, who was injured when the shearing of a defective shackle pin caused a chain tackle to fall and knock him from a scaffold. What Halecki did was no more the kind of work that the crew of a vessel was accustomed to do than was what Berge was doing. Indeed, it was less so. One might characterize Berge's work as lowering a heavy load into the hold, a normal seaman's duty done without abnormal risk of harm. Halecki's work was entirely novel and foreign to what seamen had ever done and far more dangerous to anyone who might be aboard. As in *Berge*, the work required the cessation of ship's operations and the removal of the crew.

Passing this point, I must also dissent from the majority's view that under the New Jersey Death Statute, N. J. S. 2A:31-1 (1952), a maritime claim, such as Halecki's, is not subject to the defense of contributory negligence. There is no basis for saying that the New Jersey legislature meant to abandon the defense of contributory negligence in such cases and it seems to me there is every reason as a matter of common sense and usual practice for saying that they did not mean these cases to be on a different basis. I would adopt the view of *Curtis v. Garcia*, 241 F. 2d 30 (3 Cir. 1957). Furthermore, it is difficult enough for admiralty lawyers and judges to keep up with the changes and developments in this field without expect-

ing the members of a state legislature, few if any of whom are admiralty lawyers, to take over sight unseen whatever may be held to come along in the kaleidoscope of maritime rights, as against the doctrine of contributory negligence with which New Jersey and her lawyers have long been familiar. To hold otherwise seems to me to embrace a pure fiction for the purpose of implementing "humanitarian policy."

To refuse to extend the warranty of seaworthiness to Halecki and incorporate by reference comparative negligence into the New Jersey Death Statute would not leave persons in the position of Halecki's survivors without a remedy. Besides the remedies against the employer normally incident to death by industrial accident in New Jersey, see R. S. 34:15-1, 34:15-7, 34:15-8, 34:15-9, R. S. Cum. Supp. 34:15-4, such persons apparently may alternatively elect to proceed against decedent's employer under the Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. A. §901 *et seq.* See *Davis v. Dept. of Labor and Industries of Washington*, 317 U. S. 249 (1942); *Dunleavy v. Tietjen & Lang Dry Docks*, 17 N. J. Super. 76, 85 A. 2d 343 (Cty. Ct. 1951), *aff'd* 20 N. J. Super. 486, 90 A. 2d 84 (App. Div. 1952). Nor does our refusal foreclose actions against the shipowner or the shipyard for their failure to exercise due care. Indeed such an action was brought by this appellee against Rodermond Industries for its alleged negligence in the events which led up to [fol. 179] Halecki's death. Moreover our reversal in this action would permit retrial of the cause against the shipowner on the theory of negligence.

I would dismiss so much of the complaint as relies on a warranty of seaworthiness, and reverse and remand for a new trial on the issue of negligence.

[fol. 180]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

Present: Hon. Learned Hand, Hon. Carroll C. Hincks,
Hon. J. Edward Lumbard, Circuit Judges.

ANNA HALECKI, Administratrix ad Prosequendum of the
Estate of Walter Joseph Halecki, Plaintiff-Appellee,

—v.—

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION, et al., Defendants-Appellants.

JUDGMENT—January 10, 1958

Appeal from the United States District Court for the
Southern District of New York.

This cause came on to be heard on the transcript of
record from the United States District Court for the
Southern District of New York, and was argued by counsel.

On Consideration Whereof, it is now hereby ordered,
adjudged, and decreed that the judgment of said District
Court be and it hereby is affirmed; with costs to the ap-
pellee.

A. Daniel Fusaro, Clerk

[fol. 181]

[File endorsement omitted]

[fol. 182] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 94—October Term, 1957

Docket No. 24551

[Title omitted]

PETITION FOR RE-HEARING—Filed January 24, 1958

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PETITION FOR RE-HEARING—Filed January 24, 1958

United New York and New Jersey Sandy Hook Pilots Association and United New York Sandy Hook Pilots Association, appellants, respectfully pray for a re-hearing and re-argument of this case for the reasons cited below.

With the filing of this petition appellants are also filing a petition praying that this petition for re-hearing be heard and considered in banc by all the judges of this Court who are in active service.

Statement

This is an appeal by the defendants from a judgment of the District Court for the Southern District of New York in favor of the plaintiff in an action brought pursuant to the New Jersey Wrongful Death Statute, for the death of the decedent, because of the negligence of the defendants and of the unseaworthiness of the vessel on which he was working.

The appeal was argued before Circuit Judges Hand, Hincks and Lumbard, and was affirmed in an opinion by Circuit Judge Hand, with a dissenting opinion by Circuit Judge Lumbard.

Reasons for Granting This Petition

Point I

The majority erred in applying comparative negligence to an action brought under a State Death Statute.

The opinion of the majority agreed that the contributory negligence of a decedent had been an absolute defense to an action brought under a Lord Campbell's Act, but held that this Rule had been changed by *Pope & Talbot v. Hawn*, 346 U. S. 396 (1953).

This decision, which was the sole authority cited for the fundamental change, held that an action to enforce a right rooted in Federal Maritime Law must be controlled by the Admiralty Rule of Comparative Negligence. The petitioner respectfully contends that the Rule of the *Hawn* case, involving an injured shore worker, has no application to this suit, brought by an administratrix, for wrongful death.

The Supreme Court in *Hawn* rejected the State Rule of contributory negligence, because the plaintiff's right to sue for unseaworthiness and negligence was rooted in Federal Maritime Law. *The plaintiff in this action, suing under the New Jersey Wrongful Death Statute was not [fol. 187] seeking to enforce a right rooted in Maritime Law, as no cause of action for wrongful death exists in Maritime Law.*

The misapplication of the *Hawn* Rule is made apparent by the following language from the *Hawn* opinion, which was relied upon by the majority in *Halecki*.

"The right of recovery for unseaworthiness and negligence is rooted in Federal Maritime Law. Even if *Hawn* were seeking to enforce a State created remedy for this right, Federal Maritime Law would be controlling. . . ." pages 409-410

There is no question that the "right" which *Hawn* was seeking to enforce was a Maritime right which should be controlled by the Admiralty Rule of Comparative Negligence. The "right" which the administratrix is seeking to enforce in the instant case is one which does not exist under Maritime law, but is rooted firmly in State law.

The petitioner respectfully submits that a radical departure from the position taken by other Circuits, which have applied the Rule of contributory negligence to suits under Lord Campbell's Acts should be based only upon firm legal precedents.

Point II

The majority's conclusion was contrary to the position of the United States Supreme Court.

The petitioner respectfully disagrees with the majority's statement that it was free to disregard the State Rule of contributory negligence. The Supreme Court has emphasized that Federal Courts should not infringe upon substantive rights created by the States, and that there is a clear distinction between rights rooted in the General Maritime Law, and rights based on State law. [fol. 188]. The majority has referred to *Garrett v. Moore McCormack Co.*, 317 U. S. 239 (1942), in concluding that the Rule of Comparative Negligence should be applied. However, the language of Mr. Justice Black, who delivered the majority opinion in *Garrett, supra*, demonstrated that substantive rights rooted in State Law are to be protected as zealously as those originating in Maritime Law. He stated at page 245:

"The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the Federal Courts of rights created or governed by State law. (*Erie R. Co. v. Tompkins*, 304 U. S. 64). And Admiralty Courts, when invoked to protect rights rooted in State law, endeavor to determine the issues in accordance with the substantive law of the State."

The *Garrett* opinion referred to *Erie R. Co. v. Tompkins, supra*, as did *Pope & Talbot v. Hawn, supra*. Here, it was cited for the proposition that Federal District Diversity Courts must try State created causes of action

in accordance with State laws. These references to the decision which outlined the relationship between State and Federal law, discloses the importance placed by the Supreme Court of the United States upon substantive rights given by State law. As far back as *The Harrisburg*, 119 U. S. 199 (1886), the Supreme Court held that a Federal Court, applying a State remedy, must apply it subject to the limitations of State law. This principle was affirmed in *Levinson v. Deupree*, 345 U. S. 648 (1953).

[fol. 189]

Point III

The majority misinterpreted the work done by the decedent.

Petitioner contends that the majority misunderstood the nature of the work performed by Halecki, and that the warranty of seaworthiness was erroneously extended. The opinion characterized the decedent's work as "cleaning the ship", although the record discloses that the decedent was a qualified electrician, an employee of a sub-contractor, engaged to perform specialized work aboard the ship while it was out of operation.

The "ship's cleaners" to whom the warranty was extended in other cases were men whose duties were to clean the ship in preparation for the reception of cargo. As pointed out by the dissenting opinion of Judge Lumbard, this misconception renders the Halecki decision inconsistent with the position taken by this and other Circuits.

Point IV

The majority erred in its interpretation of the New Jersey Wrongful Death Statute.

In addition to rejecting the firmly established New Jersey Rule of contributory negligence, the majority held that the New Jersey Lord Campbell's Act, *New Jersey Statutes Annotated*, 2A:31-1 (1937) was broad enough to encompass a death action based upon unseaworthiness. The majority of this Court thereby attributed to the New Jersey Legislature an intent to create a remedy to enforce a right which did not exist at the time the Statute was enacted.

The decision of the Supreme Court in *Sieracki v. Seas Shipping Company*, 328 U. S. 85 (1946), for the first time extended to a non-seaman the right to sue for unseaworthiness. [fol. 190] The New Jersey Death Statute, although of early origin, was enacted in its present form in 1937, at a time before the *Sieracki* decision, when the legislature could not possibly anticipate a death action by a shore worker, based upon a breach of warranty for unseaworthiness.

Point V

The majority erred in upholding the sufficiency of the evidence.

The majority disposed of that portion of the appeal which was based on insufficiency, by stating that the competence of the plaintiff's expert witness was within the discretion of the Trial Court. The cases cited for this holding involved instances where the qualifications of the experts had been questioned.

The petitioner respectfully submits that the majority misinterpreted this phase of the appeal, as the qualifications or competency of the expert witness were not questioned. The appellant contended that the record did not contain evidence sufficient to form a basis for the expert's opinion, and that this insufficiency was admitted by the witness himself.

The appellant's brief and argument were directed towards the insufficiency of the evidence, and not toward the competency of the witness.

Respectfully submitted,

United New York and New Jersey Sandy Hook
Pilots Association and United New York Sandy
Hook Pilots Association.

By Dougherty, Ryan & Mahoney, Attorneys for Ap-
pellants.

Dated: New York, New York
January 23, 1958.

[fol. 191] I hereby certify that I have examined the foregoing petition, that in my opinion it is well founded, and that it is not made for the purpose of delay.

Lawrence J. Mahoney

[fol. 192] Petition denied.

LH, CCH, C.JJ.

I dissent.

J.E.L., C.J.

January 29, 1958

[fol. 193] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

No. 94

October Term, 1957

Docket No. 24551

[Title omitted]

PETITION FOR HEARING IN BANC—Filed January 24, 1958

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[fol. 195] PETITION FOR HEARING IN BANC—
Filed January 24, 1958

*To the Honorable the Judges of the United States Court
of Appeals for the Second Circuit Who Are in Active
Service:*

United New York and New Jersey Sandy Hook Pilots Association and United New York Sandy Hook Pilots Association, appellants, have filed a petition for re-hearing, and in this petition, addressed to all the Judges of this Court who are in active service, prays that this appeal be heard and determined in banc.

[fol. 196] Statement

This is an appeal by the defendants from a judgment of the District Court for the Southern District of New York in favor of the plaintiff in an action brought pursuant to the New Jersey Wrongful Death Statute, for the death of the decedent, because of the negligence of the defendants and of the unseaworthiness of the vessel on which he was working.

The appeal was argued before Circuit Judges Hand, Hincks and Lumbard, and was affirmed in an opinion by Circuit Judge Hand, with a dissenting opinion by Circuit Judge Lumbard.

The majority opinion held the following:

1. The sufficiency of the evidence was within the discretion of the Trial Court.

2. The nature of the decedent's work entitled him to the warranty of seaworthiness.

3. The New Jersey Wrongful Death Act encompasses an action for unseaworthiness.

4. An action brought for negligence under the New Jersey Wrongful Death Statute, by the administratrix of a decedent fatally injured aboard ship, must be controlled by the Admiralty Rule of Comparative Negligence.

Reasons for Granting This Petition

In the petition for a re-hearing, reference was made to several material errors which petitioner respectfully contends were contained in the majority's opinion. The petitioner believes that a brief review of the facts and the opinion will demonstrate that the issues are of extreme importance.

[fol. 197] The application of the Rule of Comparative Negligence to an action under a State Death Statute is a radical departure from the position taken by other authorities, and should be based only on firm principles.

The sole authority cited by the majority for this departure was *Pope & Talbot v. Hawk*, 346 U. S. 406 (1953), which, as appears in the petition for a re-hearing, involved an entirely different cause of action.

Moreover, the re-hearing has been requested on the ground that the majority opinion conflicts sharply with the Supreme Court's firmly established position with regard to the protection of substantive State law. Petitioner respectfully contends that erroneous application of comparative negligence is a violation of the principle that Federal Courts must try State created causes of action in accordance with State laws.

The majority was in conflict with decisions of this and other Circuits when it held that the nature of the decedent's work entitled him to the warranty of seaworthiness. As pointed out by the strong dissenting opinion of Circuit Judge Lumbard, this holding was in conflict with *Berge v. National Bulk Carriers Inc.*, which was decided by the same panel on the same day. Petitioner has argued in the petition for re-hearing that the majority has misconceived the nature of the work done by the decedent.

A question also exists concerning the extent to which a Federal Court can interpret the intent of a State legislature. This issue arises because the majority has decided that the Wrongful Death Statute of New Jersey is broad enough to encompass a claim based on unseaworthiness. The petition for a re-hearing has pointed out that the Statute in question was enacted before the decision of *Sieracki v. Seas Shipping*, 328 U. S. 85 (1946), which first held that a shore worker had a right to the warranty of seaworthiness.

[fol. 198] Wherefore, petitioner respectfully prays that the appeal be heard and determined in banc by all of the Judges of this Court who are in active service.

United New York and New Jersey Sandy Hook Pilots Association and United New York Sandy Hook Pilots Association.

Dougherty, Ryan & Mahoney, By Lawrence J. Mahoney, Attorneys for Appellants.

Dated: New York, New York
January 23, 1958.

[fol. 199] [File endorsement omitted]

The within petition for rehearing in banc having been referred to all active judges of the Court at Judge Lumbard's request, it is ordered that the petition be denied, Judge Lumbard dissenting.

s/ Carroll C. Hincks, U.S.D.J.

February 20, 1958

[fol. 200]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Present: Hon. Learned Hand, Hon. Carroll C. Hincks,
Hon. J. Edwar (sic) Lumbard, Circuit Judges.

[Title^o omitted]

ORDER DENYING PETITION FOR REHEARING—
Filed January 31, 1958

A petition for a rehearing having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk

[fol. 201] [File endorsement omitted]

[fol. 202]

IN UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

Present: Hon. Charles E. Clark, Chief Judge, Hon. Harold R. Medina, Hon. Carroll C. Hincks, Hon. J. Edward Lumbard, Hon. Sterry R. Waterman, Hon. Leonard P. Moore, Circuit Judges.

[Title omitted]

ORDER DENYING PETITION FOR REHEARING EN BANC—
Filed February 20 1958

A petition for a rehearing en banc having been filed herein by counsel for the appellants,

Upon consideration thereof, it is

Ordered that said petition be and hereby is denied.

A. Daniel Fusaro, Clerk

[fol. 203] [File endorsement omitted]

[fol. 204] Clerk's Certificate to foregoing transcript, omitted in printing.

[fol. 205] SUPREME COURT OF THE UNITED STATES

No. 955—October Term, 1957

[Title omitted]

ORDER ALLOWING CERTIORARI—June 9, 1958

The petition herein for a writ of certiorari to the United States Court of Appeals for the Second Circuit is granted. The case is transferred to the summary calendar and assigned for argument immediately following No. 322.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

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JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. ~~935~~ 56

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION, a corporation and UNITED NEW YORK SANDY
HOOK PILOTS ASSOCIATION, a corporation,

Petitioners,

—against—

ANNA HALECKI, Administratrix ad Prosequendum of the
Estate of Walter Joseph Halecki, deceased, and ANNA
HALECKI, Administratrix of the Estate of Walter Joseph
Halecki, deceased,

Respondent.

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
SECOND CIRCUIT**

LAWRENCE J. MAHONEY

Counsel for Petitioners

67 Wall Street

New York 5, N. Y.

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IN THE

Supreme Court of the United States

October Term, 1957

No.

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION, a corporation and UNITED NEW YORK SANDY
HOOK PILOTS ASSOCIATION, a corporation,

Petitioners,

—against—

ANNA HALECKI, Administratrix ad Prosequendum of the
Estate of Walter Joseph Halecki, deceased, and ANNA
HALECKI, Administratrix of the Estate of Walter Joseph
Halecki, deceased,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

*To the Honorable the Chief Justice of the United States and
the Associate Justices of the Supreme Court of the
United States:*

Petitioners pray that a writ of certiorari issue to review
the judgment of the United States Court of Appeals for
the Second Circuit entered in the above entitled case on
January 10, 1958.

Opinions of the Court Below

The majority opinion of the United States Court of Appeals for the Second Circuit (Circuit Judge Hand and Circuit Judge Hincks) and the dissenting opinion of Circuit Judge Lumbard is reported at 251 F. 2d 708, and is set out in the appendix to this petition (pp. 21-39). The judgment of the United States Court of Appeals is also set forth in the appendix to this petition (pp. 40-41).

Jurisdiction

The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a citizen of New Jersey and the defendant a New York corporation.

The judgment of the United States Court of Appeals for the Second Circuit was entered on January 10, 1958. The rehearing was denied on January 31, 1958. Petition for hearing *en banc* was denied on February 20, 1958.

The jurisdiction of this Court is invoked under Title 28 U. S. Code, Section 1254(1).

Questions Presented

1. Whether an action brought pursuant to a state Wrongful Death Statute is to be determined by the state rule of contributory negligence or by the admiralty rule of comparative negligence?

2. Whether a state wrongful death statute may be extended by a Federal Court, to encompass an action for unseaworthiness, without evidence of legislative intent?

3. Whether a Federal Court may enforce a state created remedy without regard to the substantive law of the state?

4. Whether the warranty of seaworthiness extends to a shoreside electrician employed by a sub-contractor, to clean generators aboard a vessel while it was out of operation in a repair yard?

5. Whether a jury should be permitted to draw inferences when there is a complete absence of probative facts to support the conclusion reached?

The Statute Involved

The plaintiff sued in the United States District Court for the Southern District of New York to recover damages under the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1 through 6, the relevant section of which read as follows:

"2A:31-1. WHEN ACTION LIES

When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime."

Statement of Facts

The plaintiff, as administratrix of the Estate of Walter J. Halecki, brought suit in the United States District Court for the Southern District of New York, to recover damages for the personal injuries and death of the decedent, who died on October 12, 1951, allegedly as a result of the negligence of the defendants and the unseaworthiness of the pilot boat "New Jersey", owned by the defendants. The action was brought pursuant to the New Jersey Wrongful Death Act, N.J.S.A. 23:31-1, and the complaint alleged diversity of citizenship.

The facts which took place prior to trial in the District Court were as follows:

On September 22, 1951, the pilot boat "New Jersey" was turned over to Rodermond Industries, Inc., for the purpose of annual overhauling and inspection, which were undertaken by Rodermond in accordance with an agreement with the defendants. At the time of the incident the vessel was moored at a pier in the repair yard of Rodermond, North River, Jersey City, New Jersey, and was out of operation. The only employee of the defendants aboard was a watchman.

Walter Halecki, the plaintiff's decedent, was an electrician employed by K & S Electrical Company, a sub-contractor engaged by Rodermond to do electrical work aboard the ship. Neither K & S nor Rodermond, both Jersey corporations, are parties to this action. On September 29, 1951, the decedent came aboard the vessel together with a co-employee of K & S Electrical Company, one Donald Doidge. These electricians received their instructions

from their employer, K & S Electrical Company, which had undertaken to perform electrical work on the ship, in accordance with specifications given it by Rodermond Industries, Inc. These specifications included cleaning the generators on the ship, which was the work performed by the decedent and Mr. Doidge on September 29, 1951.

Donald Doidge, who had previously given a deposition for the defendants, testified on behalf of the plaintiff at the trial. Mr. Doidge was the only factual witness introduced by the plaintiff, and was the only person present at the time the work was done, in addition to the decedent.

Mr. Doidge, who was in charge of the work, testified that the date, the time and the manner in which this work was to be done, were left to his discretion, and that the customary method for cleaning generators was by use of carbon tetrachloride. On September 28, 1951, the day before the work was actually done, Doidge and Halecki set up the equipment which was to be used, including air hoses and an electric blower, supplied by Rodermond. The power was produced by shore generators, owned by Rodermond, as the "New Jersey" was a dead ship, i.e., it did not produce its own power.

On the morning of September 29, 1951, the K & S employees, under the supervision of Mr. Doidge, set up portable blowers in the engine room where they were working, and also brought gas masks with them, as the cleaning of the generators was done by spraying them with carbon tetrachloride. The engine room where this work was done was only one level below the main deck, and both doorways and the skylight were open. The ship's ventilation system was also operated by power from a generator on shore.

Mr. Doidge testified that the decedent did most of the actual spraying, and that he wore a gas mask during the performance of the work, which continued uneventfully from 8:30 A.M. to 4:00 P.M. The decedent left Mr. Doidge without making any complaint other than that he had a peculiar taste in his mouth.

Mr. Halecki became ill at home, and on October 2, 1951, was admitted to the Medical Center in Jersey City, where he died on October 12, 1951. The hospital record stated that the cause of death was carbon tetrachloride poisoning, and the record also disclosed that the decedent had habitually consumed excessive amounts of alcohol.

Mr. Doidge testified that all of the equipment and ventilation systems had operated perfectly during the day, and that in his opinion the ventilation was adequate, and also that he and the decedent had used carbon tetrachloride on many occasions, and were completely familiar with its properties.

Robert Gaines, a bio-chemist, testified as an expert on behalf of the plaintiff, regarding the qualities of carbon tetrachloride, and the degree of concentration necessary to produce a dangerous condition. Mr. Gaines had never been aboard the pilot boat "New Jersey", and his testimony as an expert was based upon the description of the engine room given by witness, Donald Doidge, and also upon certain photographs of the engine room which had been introduced.

Mr. Gaines testified that a safe concentration of carbon tetrachloride was 100 parts per million, and that in his opinion, a concentration of 20,000 parts per million existed

in the engine room of the pilot boat "New Jersey". Upon cross-examination, Mr. Gaines admitted that the concentration of carbon tetrachloride would depend upon such factors as the horse power of the ventilator motors, the location of the ducts, the size and angle of the fan blades, the location of exhaust vents, the size and arrangement of portable blowers and air hoses, and the condition of the gas mask used. The witness further testified that these factors, which were unknown to him, were essential in estimating the concentration.

The defendants introduced the testimony of William M. Finkenaer, a marine engineer who had actually tested the ventilation system aboard the vessel. Mr. Finkenaer testified that the system was entirely adequate and efficient to perform the function for which it was designated.

The defendants also produced as an expert witness, Dr. Milton Helpern, the New York State Medical Examiner, who emphasized that a person who drinks to excess has a strong pre-disposition to carbon tetrachloride poisoning. Dr. Helpern reviewed the medical records of the decedent, and stated, that in his opinion, Mr. Halecki's history of alcoholism created a susceptibility to a slight exposure of the substance.

The case was tried before the Honorable Edward Weinfeld and a jury in December, 1956, and January, 1957, and resulted in a jury verdict in favor of the plaintiff in the total amount of \$65,000. After judgment was entered, the defendants filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit.

The appeal was argued in the United States Court of Appeals for the Second Circuit on November 21, 1957,

before Circuit Judges Hand, Lumbard and Hineks. On January 10, 1958, the opinion of the Court of Appeals was handed down and judgment entered. The majority, consisting of Circuit Judges Hand and Hineks affirmed the judgment of the District Court, and Circuit Judge Lumbard dissented.

The majority opinion delivered by Circuit Judge Hand held that the decedent performed the type of work which entitled him to the warranty of seaworthiness, and that the New Jersey Death Statute was broad enough to encompass a claim for unseaworthiness. The majority also held that the Trial Court properly applied the maritime rule of comparative negligence rather than the state doctrine of contributory negligence. The majority rejected the appellant's contention that the record below was insufficient to support the jury verdict.

The dissenting opinion of Circuit Judge Lumbard held that the decedent's work as a shoreside electrician was not that traditionally done by seamen, and he therefore was not entitled to the warranty of seaworthiness. Circuit Judge Lumbard also disagreed with the majority's view that a maritime claim brought pursuant to the New Jersey Death Statute was not subject to the defense of contributory negligence.

Subsequently, on January 24, 1958, the petitioner filed a petition for re-hearing and a petition for hearing in banc, together with a motion to stay the mandate. The petition for re-hearing was denied on January 31, 1958, with Circuit Judge Lumbard dissenting. The petition for hearing en banc was denied on February 20, 1958, again over the dis-

sent of Circuit Judge Lombard. The motion to stay the mandate was unanimously granted on February 27, 1958.

Reasons for Granting of Writ

1. The United States Court of Appeals for the Second Circuit, in applying the admiralty rule of comparative negligence to an action brought under a State Death Statute, acted in conflict with every other circuit which has passed upon the question.

The State Rule of Contributory Negligence has been uniformly applied to actions arising under the various Lord Campbell's Acts: *Graham v. A. Lusi Ltd.*, 206 F. 2d 223 (CA—5, 1953); *Hartford Accident & Indemnity Company v. Gulf Refinery Company*, 230 F. 2d 346 (CA—5, 1956); *Byrd v. The Napoleon Avenue Ferry Company Inc.*, 125 F. Supp. 573 (E. D. Louisiana, 1954), aff'd 227 F. 2d 958 (CA—5, 1955), cert. denied 351 U. S. 925; *Lee v. Pure Oil Company*, 218 F. 2d 711 (CA—6, 1956); *Curtis v. Garcia*, 241 F. 2d 30 (CA—3, 1957); *Hill v. Waterman*, 251 F. 2d 655 (CA—3, 1958). Please see also *Turner v. Wilson Line*, 242 F. 2d 414 (CA—1, 1957).

These decisions were consistent in holding that a remedy given by State law should be applied subject to the limitations of that law. All involved suits brought under State Death Statutes, and all applied the State contributory negligence rule.

The extent of the conflict is indicated by the result in *Hill v. Waterman*, *supra*, decided by the Third Circuit on February 6, 1958, shortly after the Halecki decision was handed down. Here the Third Circuit reaffirmed the hold-

ings of *Klingseisen v. Costanzo Transportation Company*, 101 F. 2d 902 (CA—3, 1939) and *Curtis v. Garcia, supra*, and applied the State doctrine of contributory negligence to an action brought under the Pennsylvania Death Statute for the death of a longshoreman.

The Third Circuit expressly rejected the application of the admiralty doctrine of comparative negligence. The importance of this disagreement with the Second Circuit is apparent because the majority in the *Halecki* decision relied heavily upon the holding of the Third Circuit in *Skovgaard v. The M/V Tungus*, 252 F. 2d 14, which had been decided on December 23, 1957.¹

Contrary to the decisions of other circuits mentioned above, the majority opinion in *Skovgaard* held that the state death statute was broad enough to encompass a claim for unseaworthiness. The Court of Appeals for the Second Circuit in the instant case agreed with that position, and took the additional step of applying the Maritime Rule of comparative negligence to a State Wrongful Death Action.

The Court of Appeals for the Second and Third Circuits stand together and oppose the other circuits in the interpretation of the State Death Statutes, but disagree between themselves regarding the rule of comparative or contributory negligence. These conflicts have created legal uncertainties which may directly affect the rights of countless litigants, particularly those engaged in maritime industries.

2. The *Halecki* decision, in applying comparative negligence, conflicted with the position of the New Jersey Courts.

¹ Counsel for the respondents in the *Skovgaard* case have recently filed a petition for a Writ of Certiorari in this Court. *Halecki* and *Skovgaard* are represented by the same counsel, and both petitions involve an interpretation of the New Jersey Death Statute.

It is not disputed that the plaintiff's rights depended upon the New Jersey Death Statute, and that these rights were rooted in State law. The Supreme Court of the United States has ruled that a Federal Court, applying a State remedy, must apply it subject to the limitations of State law. *The Harrisburg*, 119 U. S. 199 (1886) and *Levinson v. Deupree*, 345 U. S. 648 (1953).

However, the New Jersey Courts have frequently interpreted the death statute, and it is settled law in that State that contributory negligence is a complete bar to recovery. *Blaker v. The Receivers of the New Jersey Midland Railway Company*, 30 N. J. Eq. 240 (1878); *The New Jersey Express Company v. Nichols*, 33 N. J. L. 434 (1867); *Donus v. Public Service Railway*, 102 N. J. L. 644 (1926).

The inequities thereby created are readily apparent. The obligations of a defendant sued under the New Jersey Wrongful Death Act are imposed on him by State law, which in reason should also be the source of this defendant's rights. However, the *Halecki* decision deprives the defendant of a defense of contributory negligence, which is deeply rooted in New Jersey law.

3. The decision of the Court of Appeals for the Second Circuit, in applying the admiralty rule of comparative negligence to a state created remedy, is in direct conflict with the Supreme Court of the United States.

(a) This Court has frequently stated that substantive rights rooted in State Law are to be protected as zealously as those originating in Maritime Law, and that Federal Courts should not infringe upon these rights. The majority's decision in the *Halecki* case, by disregarding the

New Jersey rule of contributory negligence, is in sharp conflict with that policy.

The opinion of the Court of Appeals for the Second Circuit referred to *Garrett v. Moore McCormack Company*, 317 U. S. 239 (1942), which supports the petitioner's contention. Mr. Justice Black, who delivered the majority opinion in *Garrett*, stated at page 245:

"The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction in which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by State law (*Erie Railroad Co. v. Tomkins*, 304 U. S. 64). And admiralty courts, when invoked to protect rights rooted in State law, endeavor to determine the issues in accordance with the substantive law of the state."

The *Garrett* opinion referred to *Erie Railroad Company v. Tomkins*, as did *Pope & Talbot v. Hawk*, 346 U. S. 406 (1953). Here it was cited for the proposition that Federal District Courts must try state created causes of action in accordance with State laws. These references to the decision which outlined the relationship between the State and Federal law, disclose the importance placed by the Supreme Court of the United States upon substantive rights given by State law. As far back as *The Harrisburg*, *supra*, decided in 1886, the Supreme Court held that a federal court, applying a state remedy, must apply it subject to the limitations of State law. This principle was affirmed in *Levinson v. Deupree*, *supra*.

Please see also *Just v. Chambers*, 312 U. S. 383 (1941) and *Western Fuel Company v. Garcia*, 257 U. S. 233 (1921).

(b) The Second Circuit in *Halecki* held itself to be consistent with this Court by relying upon *Pope & Talbot v. Hawn*, *supra*, for the proposition that "faults that occur in navigable waters are exclusively the creation of Maritime Law, and are exempt from the defense of contributory negligence. . . .".

The *Halecki* majority opinion agreed that the contributory negligence of a decedent had been an absolute defense to an action brought under a Lord Campbell's Act, but cited *Hawn* as the sole authority for the fundamental change.

The petitioner respectfully contends that the rule of the *Hawn* case, involving an injured shore worker, has no application to this action, brought by an administratrix, for wrongful death. The Supreme Court of the United States, in deciding *Pope & Talbot v. Hawn*, *supra*, rejected that State rule of contributory negligence because the plaintiff's right to sue for unseaworthiness and negligence was rooted in Federal Maritime Law. The plaintiff in this action, suing under the New Jersey Wrongful Death Statute, was not seeking to enforce a right rooted in Maritime Law, as no cause of action for wrongful death exists in Maritime Law. *Just v. Chambers*, *Levinson v. Deupree*, and *The Harrisburg*, *supra*.

The misapplication of the *Hawn* rule is made apparent by the following language from the *Hawn* opinion, which was relied upon by the majority in *Halecki*:

"The right of recovery for unseaworthiness and negligence is rooted in Federal Maritime Law. Even

if Hawn was seeking to enforce a state created remedy for this right, Federal Maritime Law would be controlling . . .” (pp. 409-410).

The “right” which Hawn was seeking to enforce was a maritime right which should be controlled by the admiralty rule of comparative negligence. However, the right to sue for wrongful death, which the administratrix in the *Halecki* case is seeking to enforce, is one which does not exist under Maritime Law, but is rooted firmly in State Law.

The inconsistency created by a reliance upon the *Hawn* decision as authority for applying comparative negligence to an action for wrongful death is demonstrated by the dissenting opinion of Judge Hartigan in *O’Leary v. United States Line Company*, 215 F. 2d 708 (CA—1, 1954). His summary of the appropriate decisions of this Court supports this petitioner’s contention that in an action brought under a State Wrongful Death Statute, the plaintiff’s remedy and the plaintiff’s liability are to be determined by the application of the substantive law of the state.

4. The Court of Appeals for the Second Circuit in *Halecki* was also in conflict with other circuits, in holding that the Lord Campbell’s Act was broad enough to encompass unseaworthiness.

In this aspect of the decision, the *Halecki* opinion agreed with the Court of Appeals for the Third Circuit in *Skovgaard*, and the opinions in both cases expressly acknowledged that a conflict existed among the circuits. It is not disputed that the plaintiff in *Halecki* had no remedy for wrongful death under the General Maritime Law. *The Harrisburg, supra*; *Lindgren v. United States*, 281 U. S. 38 (1930); and *Levinson v. Deupree*, 345 U. S. 648 (1953).

Therefore, the *Halecki* action, like that of *Skovgaard*, was brought pursuant to the New Jersey Wrongful Death Statute, N.J.S.A. 2A:31-1. The Court of Appeals of the Second and Third Circuits found that a claim based on unseaworthiness could be brought under a Lord Campbell's Act. The opposite conclusion had been reached by the Fifth Circuit in *Graham v. Lusi, supra*, and in *Byrd v. Napoleon Avenue Ferry Company, supra*, and by the Sixth Circuit in *Lee v. Pure Oil, supra*. The respective Courts of Appeals held that the State Death Statutes afforded a recovery only for negligence and not for unseaworthiness.

The decisions cited above involved actions brought pursuant to the Wrongful Death Statutes of various States, all of which are similar in language to the New Jersey Act. The Second Circuit in *Halecki* and the Third Circuit in *Skovgaard*, by permitting recovery for unseaworthiness under the State Death Act directly opposed the position of the Fifth and Sixth Circuits.

5. In holding that the New Jersey Wrongful Death Act provided a remedy for unseaworthiness, the Second Circuit acted without the authority of New Jersey law.

In addition to rejecting the New Jersey rule of contributory negligence, the majority held that the Lord Campbell's Act was broad enough to encompass a death action based upon unseaworthiness. The Second Circuit thereby attributed to the New Jersey legislature an intent to create a remedy to enforce a right which did not exist at the time the statute was enacted.

The decision of the Supreme Court in *Sieracki v. Seas Shipping Company*, 328 U. S. 85 (1946), for the first time

extended to a non-seaman the right to sue for unseaworthiness. The New Jersey Death Statute, although originating in 1848, was enacted in its present form in 1937 at a time before the *Sieracki* decision, when the legislature could not possibly anticipate a death action by a shore worker, based upon a breach of the warranty for seaworthiness.

The dissenting opinion of Judge Hastie in the *Skovgaard* case considered this interpretation of the legislative intent "illogical and for that reason unwarranted". Judge Lombard, dissenting from the majority's view in the *Halecki* decision, found no basis for holding that the New Jersey Legislature intended to abandon the defense of contributory negligence.

Neither the *Halecki* nor the *Skovgaard* decision referred to authority in New Jersey Statutes or decisions for the interpretation that the Death Act provided a basis for recovery for unseaworthiness.

6. The *Halecki* decision was inconsistent with other Circuits, in holding that the decedent, an electrician, was entitled to the warranty of seaworthiness.

The Court of Appeals for the Second Circuit agreed with the appellant's contention that the nature of the decedent's work determined his right to the warranty of seaworthiness. However, the majority opinion held that *Halecki*, an electrician employed by a sub-contractor to clean generators aboard the vessel, was "cleaning the ship", and that the case therefore fell within the doctrine of *Pope & Talbot v. Hawn*, 346 U. S. 406.

The appellant had relied upon *Berryhill v. Pacific Far East Line Inc.*, 238 F. 2d 385 (CA—9, 1957), cert. den. 1

L. Ed. 2d 1537, in which the Ninth Circuit had found that the plaintiff was not doing work which entitled him to the warranty of seaworthiness. The Court emphasized that *Berryhill*, a repairman, was working on the ship's propeller shaft, and that the vessel's propulsion machinery was necessarily out of operation, and pointed out that cases which had extended the warranty to repairmen involved work which was related in some way to the loading of the vessel or with the carriage of cargo. *Torres v. The Kastor*, 227 F. 2d 664 (CA—2, 1955); *Pope & Talbot v. Hawn*, *supra*; *Pettersen v. Alaska SS Co.*, 205 F. 2d. 478 (CA—9, 1953).

The circumstances in the instant case were similar to those in *Berryhill*, for in both instances, the work could only be performed when the ship's power was off and the vessel was out of operation. Neither job could be done while the ship was at sea, and therefore neither could be classified as seaman's work. The dissenting opinion of Judge Lumbard in *Halecki* discussed the conflict created by the majority opinion, and found it inconsistent with *Berryhill*. He referred to the nature of Halecki's work, and stated his opinion that spraying generators with carbon tetrachloride was not a seaman's work, but was the task of a shoreside specialist.

Judge Lumbard also referred to the anomolous situation created within the Second Circuit by the decision of *Berge v. National Bulk Carriers Corporation*, 251 F. 2d 717, which was decided by the same panel on the same day as the *Halecki* decision. This opinion was also delivered by Circuit Judge Hand, who stated that the plaintiff was not entitled to the warranty of seaworthiness because he did not do seaman's work. Berge was a rigger installing a

bulkhead aboard a ship, and here again the work required that the ship be out of operation. Judge Lumbard stated in dissent that Halecki's work was even more remotely related to a seaman's duties than that done by Berge, and found that the two decisions were clearly inconsistent. The fact that both decisions were handed down by the same panel of the Court serves to accentuate the confusion concerning the type of worker who is entitled to the warranty of seaworthiness. The Court in *Berge* acknowledged that a conflict existed, and Circuit Judge Lumbard concurred for the same reasons which impelled him to dissent in *Halecki*.

7. The Court of Appeals for the Second Circuit also conflicted with decisions of the Supreme Court of the United States in holding that the record justified referring the case to the jury.

In contending that the plaintiff had failed to establish unseaworthiness or negligence at trial, the appellant had pointed out to the Court of Appeals that there was no testimony to establish the conditions complained of aboard the defendant's vessel.

To summarize the plaintiff's case, the only factual witness, Donald Doidge, had stated that the ventilation was adequate. The plaintiff's expert witness had testified that he had never been aboard the vessel and that he was without knowledge of many factors which he admitted were necessary to form an opinion of the conditions which existed.

This Court has frequently expressed the principle that a jury verdict must rest upon affirmative evidence and not

upon speculation. *Moore v. Chesapeake & Ohio Railroad Company*, 340 U. S. 573 (1951); *Pennsylvania RR Company v. Chamberlain*, 288 U. S. 333 (1933); *Gunning v. Cooley*, 281 U. S. 90 (1930).

The circumstances in *Halecki* were clearly distinguishable from the Supreme Court decision of *Schulz v. Pennsylvania RR Company*, 350 U. S. 523 (1956). The *Schulz* record contained evidence of several negligent or dangerous conditions which could have caused the death of the decedent. This Court held that the jury should have been permitted to decide which of several possible causes had brought about the accident.

However, the *Halecki* record did not contain proof of any dangerous condition, and the jury was first allowed to speculate upon the existence of a defect aboard the appellant's vessel, and then to further surmise that this supposed condition caused the decedent's death.

An earlier Supreme Court decision emphasized the distinction in *Lavender v. Kurn*, 327 U. S. 645 (1946). The Court there was demonstrating that a jury should be permitted, as in the later *Schulz* case, to decide which of several possible inferences is the most reasonable. However, the Court pointed out that there must be evidence upon which to base the inference. It was stated:

"Whenever facts are in dispute or the evidence is such that fair minded men may draw different inferences a measure of speculation and conjecture is required on the part of those whose duty it is to settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support

the conclusion reached does a reversible error appear" (p. 653).

CONCLUSION

A writ of certiorari should be granted in accordance with the prayer of this petition.

Dated, New York, N. Y., April 28, 1958.

Respectfully submitted,

LAWRENCE J. MAHONEY
Counsel for Petitioners
67 Wall Street
New York 5, N. Y.

APPENDIX

Opinions of United States Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 94—October Term, 1957.

(Argued November 21, 1957 Decided January 10, 1958.)

Docket No. 24551

ANNA HALECKI, *Administratrix ad Prosequendum* of the
Estate of Walter Joseph Halecki, deceased, and ANNA
HALECKI, *Administratrix* of the Estate of Walter Joseph
Halecki, deceased,

Appellee,

—v.—

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION, a corporation and UNITED NEW YORK SANDY
HOOK PILOTS ASSOCIATION, a corporation,

Appellants.

Before:

HAND, HINCKS, and LUMBARD,

Circuit Judges.

Appeal by the defendants from a judgment of the District
Court for the Southern District of New York in favor of the

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plaintiff in an action to recover damages for the death of the decedent in the State of New Jersey because of the negligence of the defendants and of the unseaworthiness of a pilot boat on which he was employed. Affirmed.

LAWRENCE J. MAHONEY *for the appellants.*

NATHAN BAKER *for the appellee.*

HAND, *Circuit Judge:*

This appeal is from a judgment for the plaintiff entered on the verdict of a jury, awarding damages for the death of the plaintiff's decedent while engaged in cleaning the pilot boat, "New Jersey," belonging to the defendants. The complaint was based upon two counts; one for negligence and the other for unseaworthiness, and four errors are alleged. First, that the evidence was not sufficient to justify a verdict on either count. Second, that the court erred in submitting to the jury any question of seaworthiness. Third, that the court should have charged the jury that under the New Jersey Death Statute contributory negligence was a bar and not a limitation upon damages. Fourth, that the defendants should have been allowed to show that the plaintiff had made inconsistent allegations in another and pending litigation.

On September 22, 1951, the "New Jersey," a pilot boat, was moored at a pier in the repairyard of Rodermond Industries, Inc., North River, Jersey City, for annual overhaul and repairs; the only employee of the defendants on board was a watchman. Part of the work was to clean the ship's generators which had become fouled in use, and Rodermond Industries subcontracted this part of the job

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to K. & S. Electrical Company, the employer of the decedent, Halecki. On the 28th he and Doidge, a fellow worker, set up the necessary equipment on the boat. Since she was at the time without any electrical current, it was necessary to bring in current from the shore. The generators were cleaned by spraying them with carbon tetrachloride, a volatile liquid, which will "remove all traces of dirt and film," but whose fumes, unless their density is carefully controlled, may be deadly. The generators were in the ship's engine-room, one deck below the main deck, and Doidge and the decedent sought to protect themselves during the work, (1) by using gas masks, and (2) by bringing two "air hoses" and a "blower," actuated by the current from the shore. One hose was used to spray the tetrachloride upon the generators; the other, to blow in fresh air from the outside. The "blower" was set at the bottom of the engine-room near the generators, and from it led an exhaust pipe to an open door about eight feet above. In addition, the ship's permanent ventilating system was set in action by the outside current; it consisted of some fans and "vents" at the top of the engine-room through which air was drawn in. Thus, means of exhausting the contaminated air consisted of (1) the hose that was not used to spray, (2) the "blower," and (3) the increase of air pressure resulting from the intake of the ship's own ventilating system. Besides this, an open door and an open skylight led to the air. A biochemist, familiar with the use of tetrachloride, after being told in detail the size of the engine-room and the apparatus installed, gave as his opinion that the ventilating system in the engine-room, even when supplemented by the apparatus brought on board and installed by Doidge and

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the deceased was not "adequate to remove the fumes." The competence of this expert to give an opinion was so much within the discretion of the trial court that only in a clear case should we overrule its decision.¹ The state law of evidence is no longer the final test of the admissibility of evidence.

As we have said the case was left to the jury in a double aspect: (1) whether the defendants had been negligent in furnishing the deceased as a "business guest" with an unfit place to work, and (2) whether the ship was unseaworthy vis-a-vis a shore worker who came aboard to take part in the annual overhaul. It is obvious therefore that the plaintiff's evidence had to support a verdict on both claims; for we cannot know that the unsupported claim was not the one on which alone they brought in their verdict. As to the claim based on negligence, so far as the defendants mean to argue that the engine-room, equipped as it was, was a reasonably safe place in which to work, we hold that the evidence created an issue that could be decided only by a verdict. The deceased was certainly an "invited person," or "business guest," and the shipowner was liable, not only for the negligence of the master,² but, although the work was let out to a subcontractor, also for any lack of "reasonable care to ascertain the methods and manner in which the concessionaire or independent contractor carries on his activities, not only at the time when the concession is let,

¹ *United States v. Miller*, 61 F. 2d 949, 950 (C. A. 2); *Tucker v. Loew's Theatre & Realty Co.*, 149 F. 2d 677, 679 (C. A. 2); *Trowbridge v. Abrasive Co.*, 190 F. 2d 825, 829 (C. A. 3); 2 Wigmore, §561.

² *Leathers v. Blessing*, 105 U. S. 626, 630.

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or the contractor employed, but also during the entire period in which the concessionaire or contractor carries on his activities.”³ Being charged with knowledge that so dangerous a substance as tetrachloride might be used, it was proper to leave to the jury whether the “methods and manner” of its use were proper. So much for the negligence count.

Quite a different question arises as to the warranty of seaworthiness, for, if that attached, it imposed an absolute liability, if the engine-room was not properly equipped. Although in a very scholarly analysis of the earlier decisions, it has been recently argued that the maritime law did not impose such a warranty in favor of seamen,⁴ rightly or wrongly the opposite doctrine has become so firmly settled since *The Osceola*, 189 U. S. 158 (1902) that we decline to reconsider the question. All that is left for us on this appeal is whether the warranty of seaworthiness extended to the decedent although concededly he was not a seaman, but as we have said, a “business guest” on a vessel within the navigable waters of New Jersey. In *Guerrini v. United States*, 167 F. 2d 352 (C. A. 2), the ship, as in the case at bar, was moored in Brooklyn alongside a dock, and the libellant, an employee of a subcontractor, was engaged in cleaning her boilers and tanks, when he was hurt by slipping on a grease spot. We held that the doctrine of *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, did not apply. However, that was in 1948 before either *Pope & Talbot v. Hawn*,

³ Restatement of Torts, Vol. II, §344, Comment b.

⁴ “Seamen, Seaworthiness and the Rights of Harbor Workers,” Francis L. Tetrault, 39 Cornell Law Quarterly, 381.

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346 U. S. 406 or *Petterson v. Alaska SS. Co.*, 347 U. S. 396, was decided; it is now clear that we were wrong both in limiting the warranty to those doing longshoremen's duties and in supposing that the surrender of "control" of the ship was relevant. We can see no distinction between the work of the decedent in the case at bar and that of the plaintiff in *Pope & Talbot v. Hawn*, *supra* (346 U. S. 396), which was carpenter's repair work. We think that the test is whether the work is of a kind that traditionally the crew has been accustomed to do, and as to that it makes no difference that the means employed have changed with time, or whether defective apparatus was brought aboard and was not part of the ship's own gear. Since the deceased was cleaning the ship, we hold that it was within the doctrine of *Pope & Talbot v. Hawn*, *supra*.

As might be expected, so shadowy a line of demarcation will in application produce inconsistent results. For example, in *Read v. United States*, 201 F. 2d 758, the Third Circuit held that the warranty extended to a "business guest" who was doing part of the work of changing a "Liberty" ship into a transport, while the Ninth Circuit in *Berryhill v. Pacific Far East Line*, 238 F. 2d 385, cert. den. 354 U. S. 938, refused relief to a workman who was engaged in "major repairs," as these were described in the District Court (138 Fed. Supp. 859). In the appeal in *Berge v. National Bulk Carriers, Inc.* (148 Fed. Supp. 608), decided herewith, we shall state the reasons that impel us to prefer the decision of the Ninth Circuit, but it is not necessary to pass on that question here, because as we have said, the work did not involve any structural changes

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in the ship, but was of a kind that was part of the crew's work, not only at sea, but when she was laid up for general overhaul. We start therefore with the conclusion that it was proper to leave to the jury, not only the issue of negligence, but that of unseaworthiness.

That does not however answer two other objections: (1) that the plaintiff is not the decedent, but an administratrix, and (2) that the judge left the decedent's contributory negligence to the jury, not as a bar, but only in limitation of damages. It is common ground that the liability for breach of the warranty of unseaworthiness does not survive under the maritime law (*The Harrisburg*, 119 U. S. 199; *Lindgren v. United States*, 281 U. S. 38). As to the maritime tort, §33 of the Merchant Marine Act of 1920 (Title 46, §688) gave to "the personal representatives" of a deceased seaman the same remedies that the deceased would have had, had he lived. However, in the case at bar the deceased was not a seaman, so that upon both counts the plaintiff must resort to the "Lord Campbell's Act" of New Jersey⁵ which provides in general terms: "When the death of a person is caused by a wrongful act, neglect or default such as would . . . have entitled the person injured to maintain an action for damages . . . the person who would have been liable . . . shall be liable in an action for damages." Much controversy has arisen over the scope of the phrase just quoted, making the liability to the next of kin depend upon an "act, neglect or default" of the putative obligor. When the question arose in the Third

⁵ N. J. S. A. 2A:31-1.

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Circuit whether these words covered a breach of the warranty of seaworthiness, the court *in banco* by a vote of four to three held (*Skovgaard v. The Tungus*, December 23, 1957) that they did. In spite of the zeal with which the contrary has been argued, we think that the majority was right. *Graham v. Lusi*, 206 F. 2d 223 (C. A. 5) does not actually hold the contrary; though that may have been the court's opinion. Its decision was based solely on the point of contributory negligence, and did not pass upon the ruling of the district court that the libel could not rest on breach of warranty. *Lee v. Pure Oil Co.*, 218 F. 2d 711 (C. A. 5) held that, even vis-a-vis the deceased, there was no breach of warranty, and then went on to say that in any event his administratrix could not recover. The report does not tell us what was the language of the Tennessee statute; but if it was the same as that of New Jersey, we are not persuaded. We hold that "neglect" and "default" both cover a breach of the warranty.

There remains, however, the further question: *i.e.*, whether contributory negligence is an absolute defense. Before the decision of the Supreme Court in *Pope & Talbot v. Hawn*, *supra*, it had been generally held that when a seaman before the Merchant Marine Act of 1920, or a shoreworker thereafter, had been killed because of the negligence of the ship's crew in the navigable waters of a state having a local Lord Campbell's Act, contributory negligence was a bar to an action by his next of kin. This was as true when the suit was in the admiralty as in a court of the state; in short, the bar arising from contributory negligence was an incident of the liability imposed by the state,

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no matter where suit upon it was brought.⁶ In *Pope & Talbot v. Hawk*, *supra*, however, the Court held that contributory negligence was not a bar to an action at law by a "business guest," but only limited his damages, and this we read to mean that rights arising from faults that occur in navigable waters are exclusively the creation of maritime law, and are exempt from the defense of contributory negligence whether suit upon it is in the admiralty or in an action at law, state or federal.⁷ The following language we take from the opinion of the majority in that case, pages 409, 410: "the right of recovery for unseaworthiness and negligence is rooted in federal maritime law. Even if Hawk were seeking to enforce a state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement federal maritime policies a state may not deprive a person of any substantial admiralty rights as defined by acts of congress, or interpretative opinions of this Court." Although, as we have said, we are not dealing with "federal maritime law," we should remember that so far as we can we ought to construe the statute so as to avoid capricious and irrational distinctions. We leave open whether New Jersey is without power to take as much or as little of the rights "rooted in federal maritime law" as it chooses as the model for the right it confers upon the next of kin; but the courts of that state

⁶ *Robinson v. Detroit V. C. Steam Navigation Co.*, 73 F. 883 (6th Cir. 1896); *Quinette v. Bisso*, 136 F. 825 (5th Cir. 1905); *O'Brien v. Luckenbach S.S. Co.*, 293 F. 170 (2d Cir. 1923); *Klingseisen v. Costanzo Transp. Co.*, 101 F. 2d 902 (3d Cir. 1939); *Graham v. A. Lusi*, 206 F. 2d 233 (5th Cir. 1953); *The A. W. Thompson*, 39 F. 115 (S. D. N. Y. 1889 *per* Addison Brown, J.); *The James M'Gee*, 300 F. 93 (S. D. N. Y. 1924).

⁷ *Cf. Garrett v. Moore-McCormick Co.*, 317 U. S. 239.

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have never passed upon the question, and to deny the exemption to the next of kin seems to us to the last degree capricious and irrational. Although it was only a dictum, the First Circuit in *O'Leary v. United States Lines Company*, 215 F. 2d 708, 711, declared that "it would be incongruous to hold in conformity with *Pope & Talbot v. Hawn*, *supra*, that the maritime law determined the respective rights of the parties in the event of personal injuries short of death, but that state law determined their rights in the event of injuries resulting in the ultimate consequence of death." We are aware that *Curtis v. Garcia*, 241 F. 2d 30, 36 (C. A. 3) is to the contrary, but as neither it nor *O'Leary v. United States Lines Company, supra*, is authoritative, we are free to choose. Obviously, the answer is not certain; we must do as best we can with what we have, and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar.

Finally, the defendants complain that the judge refused to allow them to prove that the plaintiff in another action had asserted that Rodermond Industries had control of the vessel. Even though this were an error—on which we do not pass—obviously it was not of enough importance to reverse the judgment.

Judgment affirmed.

LUMBARD, *Circuit Judge* (dissenting):

I cannot agree that we must subscribe to the principle that a shore-based worker who performs any labor on a ship, even though the ship is out of operation and tied fast

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to a dock for overhaul, should have extended to him a warranty of seaworthiness merely because the work which he is doing can be generally characterized in terms of the duties which a seaman could be expected to perform. It is not enough to categorize Halecki's work as cleaning ship's equipment. Here the inescapable fact is that Halecki, in spraying the generators with carbon tetrachloride, was doing something which a seaman could not do, which no seaman had ever done, and which would expose the seaman's life to serious danger if he even attempted it.

A summary of the evidence showing how the generators were cleaned by spraying with carbon tetrachloride shows the absurdity of assimilating this work to that of a seaman or of saying that the work "is of a kind that traditionally the crew has been accustomed to do."

On Saturday, September 22, 1951 the pilot boat "New Jersey," owned by the appellants, was turned over to Rodermond Industries, Inc. for its annual overhaul and inspection. It was moored at the Rodermond repair yard pier at the foot of Henderson Street, North River, Jersey City, New Jersey. A list of repairs, prepared by Rodermond the following Monday, September 24 provided that the crew was to remove and replace the eight cylinder heads for the port and starboard generators, and the contractor was to do some work on the cylinder heads. Under the same heading "Port & Star Generators" it was provided:

"Spray clean with carbon tetrachloride the armature and field windings to remove all traces of dirt and film. Close up and prove in good order."

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Rodermond in turn subcontracted with Halecki's employer, the K & S Electrical Company, to do certain electrical work and to spray the generators with carbon tetrachloride, since neither ship nor shipyard was equipped or competent to do this work. The K & S foreman, Donald Doidge, was at work on the New Jersey from Monday, September 24, and on that day he consulted with the New Jersey's chief engineer as to when the spraying should be done as "we know it has to be done when there is nobody else on board ship." Doidge agreed with the chief engineer that it should be done on Saturday during the absence of the crew, since during the week members of the crew were working on the ship.

Pursuant to these arrangements, Doidge and Halecki made preparations on Friday for the Saturday spraying. Doidge, the shop foreman, had been an electrician for about 25 years and Halecki had worked with him for about 6 years. Not all their work was on ships; they cleaned generators by carbon tetrachloride spray in factories and buildings, wherever the generators were. On Friday they brought on board extra air hoses and a blower belonging to Rodermond. One air hose was used for the spray gun and the other was used underneath the generator as an exhaust to blow the fumes away from the man spraying. A high compression "blower" was placed so that it would exhaust foul air out through one of the two open doorways.

On Saturday morning, September 29, according to the previous arrangement, Doidge and Halecki came aboard to do the spraying. They found only the defendant's watchman, Walter C. Thompson, and they told him to stay out of

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the engineroom and not to let anybody down. They brought with them three gas masks belonging to K & S Electric Company. Halecki wore a gas mask and did most of the spraying 10 to 15 minutes at a time with intervening rest periods of equal length. All the equipment for exhausting the fumes and the ship's ventilating system were in operation and run by power supplied from generators on shore. Halecki took sick the next day and died two weeks later. There was sufficient evidence to support the jury's finding that death was caused by carbon tetrachloride poisoning.

Despite history and logic, the trend of decisions in cases involving injuries and death on navigable waters, now further extended by my distinguished colleagues, seems to be guided by what Justice Rutledge has frankly called a "humanitarian policy." *Seas Shipping v. Sieracki*, 328 U. S. 85, 95 (1946). This policy seems to be based on the theory that judges are competent to determine that it is better that the shipowners should assume all the burdens because they are able to average them out through insurance or some form of protection against all the hazards of accident which may occur on shipboard to anyone coming on board. The result has been a progressive expansion, both qualitative and quantitative, in the duties and liabilities imposed upon shipowners.¹ From a concept resting on negligence, seaworthiness has, by judicial development, become an absolute duty imposing liability without fault. From a duty running to those we traditionally consider as

¹ See Tetreault's, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 Cornell L. Q. 381 (1954); *The Tangled Seine: A Survey of Maritime Personal Injury Remedies*, 57 Yale L. J. 243, 252 (1947); Gilmore and Black, *The Law of Admiralty*, 315-324, 358 (1957).

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seamen, exposed to the hazards and discipline of the sea, it has been expanded to include a multitude of harbor workers who report for work in the morning and return to their homes at night. The burdens of proving lack of due care and of defending against the bar of contributory negligence are jettisoned by this judicial legislation. Where there is the slightest support for causation the only question for the jury is the amount of damages.

It may be argued that the initiative taken by the federal courts in imposing absolute liability is justified by their peculiar historical responsibility for admiralty law. And we are told that certain harbor workers come within the ambit of the warranty of seaworthiness because a shipowner cannot escape liability by delegating to others what is traditionally seamen's work. *Seas Shipping v. Sieracki*, 323 U. S. 85, 95 (1946). Here we go further. When a lower court charges on both seaworthiness and negligence toward a business invitee, we must assume that the only justification for the charge on seaworthiness is that the shipowner may be found liable despite his own due care. By assimilating certain activities to maritime law, we extend the absolute liability of shipowners, in effect, beyond the shipyard gates. The owner, despite the utmost care, is liable for the activities of a specialist employed expressly because these activities were beyond the range of experience and competence of the ship's crew. These circumstances rebut the contention that the shipowner is nullifying his liability by parcelling out ship's work to others.

The anomaly of the result reached here is pointed up when we consider the restricted liability of the specialist's

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employer, who is in the most favorable position to reduce the incidence of injury. Unlike the shipowner, the immediate employer's liability is restricted to the insurance expenses of workmen's compensation or to damages incurred due to his lack of due care. Although the shipowner was not Halecki's employer and this was essentially an industrial injury resulting in the death of a shore-based electrician, an absolute liability of judicial creation is imposed upon the shipowner above and beyond the system developed by New Jersey to compensate for industrial accidents. I had thought that such far-reaching changes in rights and legal duties were solely within the province of the elected representatives of the people in Congress and not the proper business of judges. The traditional responsibility of the federal judiciary for admiralty does not justify such an expansion of liability.

Halecki risked all the hazards of the sea as one might experience them on a Saturday in late September, while the ship was made fast to a bulkhead in Jersey City. He was not a seaman, he was not doing what any crew member had ever done on this ship or anywhere else in the world so far as we are informed. Whatever reasons there may be for extending the warranty of seaworthiness to stevedores or other harbor workers who work on board, they do not apply to those employed to do a special job of such a dangerous and unusual nature that it is beyond the competence of ship and shipyard, necessitates the removal and exclusion of the crew, and requires bringing extra equipment aboard for the safe performance of the hazardous activity.

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The case of *Berryhill v. Pacific Far East Line*, 238 F. 2d 385 (9 Cir. 1956) cert. den. 354 U. S. 938, is authority for the proposition that when the manner of doing the work is foreign to what the ship's crew could do and involves the use of equipment not used or known on ships, there is no warranty of seaworthiness running to those who are injured in the course of doing such work by reason of any defect in the equipment so used. In that case the plaintiff was injured by the shattering of a grinding wheel brought on board by his employer, Todd Shipyards Corporation, for use in repairs being made on the "shaft keyway" on defendant's ship. The Court of Appeals held there was no warranty of seaworthiness with respect to the grinding wheel. Judge Barnes pointed out that to hold otherwise would go beyond the *Sieracki*, *Hawn* and *Petterson*² cases as the grinding wheel was equipment that the ship could do without, and the shipowner may never have had any reason to know that such equipment existed. That the kind of equipment used is foreign to the vessel is just another way of saying that the work done is not the kind of work normally done by seamen.

My brothers say that this work was merely cleaning a generator and, as cleaning propulsion machinery is the kind of work which seamen would normally do, cleaning a generator is seamen's work and those who do it are entitled to a warranty of seaworthiness. This assimilates spraying with carbon tetrachloride to all cleaning as if it

² *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946); *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406 (1953); *Petterson v. Alaska S. S. Co.*, 205 F. 2d 478 (9 Cir. 1953), aff'd per curiam 347 U. S. 396 (1954).

Appendix—Opinions of United States Court of Appeals

were harmless and commonplace; it is a play on words which by a characterization avoids dealing with a difference in means which completely destroys the validity of the syllogism. Because seamen may be able to do some kind of cleaning does not make seamen of those who do another kind of cleaning which seamen have never done and cannot do; nor does it supply any reason why an outside specialist should be treated, or needs to be treated, like a seaman.

That such general characterization is not a solution is emphasized by *Berge v. National Bulk Carriers Corp.*, decided this day. There the same panel of this court holds unanimously that there is no warranty of seaworthiness to a rigger, engaged in installing a tank bulkhead in the course of rebuilding a vessel, who was injured when the shearing of a defective shackle pin caused a chain tackle to fall and knock him from a scaffold. What Halecki did was no more the kind of work that the crew of a vessel was accustomed to do than was what Berge was doing. Indeed, it was less so. One might characterize Berge's work as lowering a heavy load into the hold, a normal seaman's duty done without abnormal risk of harm. Halecki's work was entirely novel and foreign to what seamen had ever done and far more dangerous to anyone who might be aboard. As in *Berge*, the work required the cessation of ship's operations and the removal of the crew.

Passing this point, I must also dissent from the majority's view that under the New Jersey Death Statute, N. J. S. 2A:31-1 (1952), a maritime claim, such as Halecki's, is not subject to the defense of contributory negligence.

Appendix—Opinions of United States Court of Appeals

There is no basis for saying that the New Jersey legislature meant to abandon the defense of contributory negligence in such cases and it seems to me there is every reason as a matter of common sense and usual practice for saying that they did not mean these cases to be on a different basis. I would adopt the view of *Curtis v. Garcia*, 241 F. 2d 30 (3 Cir. 1957). Furthermore, it is difficult enough for admiralty lawyers and judges to keep up with the changes and developments in this field without expecting the members of a state legislature, few if any of whom are admiralty lawyers, to take over sight unseen whatever may be held to come along in the kaleidoscope of maritime rights, as against the doctrine of contributory negligence with which New Jersey and her lawyers have long been familiar. To hold otherwise seems to me to embrace a pure fiction for the purpose of implementing "humanitarian policy."

To refuse to extend the warranty of seaworthiness to Halecki and incorporate by reference comparative negligence into the New Jersey Death Statute would not leave persons in the position of Halecki's survivors without a remedy. Besides the remedies against the employer normally incident to death by industrial accident in New Jersey, see R. S. 34:15-1, 34:15-7, 34:15-8, 34:15-9, R. S. Cum. Supp. 34:15-4, such persons apparently may alternatively elect to proceed against decedent's employer under the Longshoremen's and Harbor Worker's Compensation Act, 33 U. S. C. A. §901 *et seq.* See *Davis v. Dept. of Labor and Industries of Washington*, 317 U. S. 249 (1942); *Dunleavy v. Tietjen & Lang Dry Docks*, 17 N. J. Super. 76, 85 A. 2d 343 (Cty. Ct. 1951), *aff'd* 20 N. J. Super. 486, 90 A.

Appendix—Opinions of United States Court of Appeals

2d 84 (App. Div. 1952). Nor does our refusal foreclose actions against the shipowner or the shipyard for their failure to exercise due care. Indeed such an action was brought by this appellee against Rodermond Industries for its alleged negligence in the events which led up to Halecki's death. Moreover our reversal in this action would permit retrial of the cause against the shipowner on the theory of negligence.

I would dismiss so much of the complaint as relies on a warranty of seaworthiness, and reverse and remand for a new trial on the issue of negligence.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of January, one thousand nine hundred and fifty-eight.

Present:

HON. LEARNED HAND

HON. CARROLL C. HINCKS

HON. J. EDWARD LUMBARD

Circuit Judges

ANNA HALECKI, Administratrix ad Prosequendum of the
Estate of Walter Joseph Halecki,

Plaintiff-Appellee,

—v.—

UNITED NEW YORK AND NEW JERSEY SANDY HOOK
PILOTS ASSOCIATION, *et al.*,

Defendants-Appellants.

*Appeal from the United States District Court for the
Southern District of New York*

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

Appendix—Judgment.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed; with costs to the appellee.

A. DANIEL FUSANO
Clerk

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JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 56

**UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION, a corporation and UNITED NEW YORK SANDY
HOOK PILOTS ASSOCIATION, a corporation,**

Petitioners,

—against—

**ANNA HALECKI, Administratrix ad Prosequendum of the
Estate of Walter Joseph Halecki, deceased, and ANNA
HALECKI, Administratrix of the Estate of Walter Joseph
Halecki, deceased,**

Respondent.

BRIEF FOR THE PETITIONER

LAWRENCE J. MAHONEY
Counsel for Petitioners
67 Wall Street
New York 5, New York

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IN THE
Supreme Court of the United States

October Term, 1958

No. 56

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION, a corporation and UNITED NEW YORK SANDY
HOOK PILOTS ASSOCIATION, a corporation,

Petitioners,

—against—

ANNA HALECKI, Administratrix ad Prosequendum of the
Estate of Walter Joseph Halecki, deceased, and ANNA
HALECKI, Administratrix of the Estate of Walter Joseph
Halecki, deceased,

Respondent.

BRIEF FOR THE PETITIONER

Opinions of the Court Below

The majority opinion of the United States Court of
Appeals for the Second Circuit (Circuit Judge Hand and
Circuit Judge Hincks) (R. 147), and the dissenting opinion
of Circuit Judge Lombard (R. 154), is reported at 251
F. 2d 708.

Jurisdiction

The jurisdiction of the District Court was invoked because of diversity of citizenship, the plaintiff being a citizen of New Jersey and the defendant, a New York Corporation.

The Judgment of the United States Court of Appeals for the Second Circuit was entered on January 10, 1958 (R. 161). Petition for rehearing was denied on January 31, 1958 (R. 171). Petition for hearing *en banc* was denied on February 20, 1958 (R. 172).

The jurisdiction of this Court was invoked under Title 28 U. S. Code, Section 1254 (1). The petition was filed on April 28, 1958, and was granted on June 9, 1958.

Questions Presented

1. Whether an action, brought pursuant to a State Wrongful Death Statute is to be determined by the State rule of contributory negligence or by the Admiralty rule of comparative negligence?

2. Whether a State Wrongful Death Statute may be extended by a Federal Court, to encompass an action for unseaworthiness, without regard to the substantive law of the State?

3. Whether the warranty of seaworthiness extends to a shoreside electrician employed by a sub-contractor, to clean generators aboard a vessel while it was out of operation in a repair yard?

4. Whether a jury should be permitted to draw inferences when there is a complete absence of probative facts to support the conclusion reached?

The Statute Involved

The plaintiff sued in the United States District Court for the Southern District of New York to recover damages under the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1 through 6, the relevant section of which reads as follows:

"2A:31-1 When Action Lies

When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime."

Statement

The plaintiff, as administratrix of the Estate of Walter J. Halecki, brought suit in the United States District Court for the Southern District of New York, to recover damages for the personal injuries and death of the decedent, who died on October 12, 1951, allegedly as a result of the negligence of the defendants and the unseaworthiness of the pilot boat "New Jersey", owned by the defendants. The action was brought pursuant to the New Jersey Wrongful

Death Act, N.J.S.A. 23:31-1, and the complaint alleged diversity of citizenship.

The facts which took place were as follows:

On September 22, 1951 the pilot boat "New Jersey" was turned over to Rodermond Industries, Inc., for the purpose of annual overhauling and inspection (R. 122), which were undertaken by Rodermond in accordance with an agreement with the defendants (R. 77). At the time of the incident the vessel was moored at a pier in the repair yard of Rodermond, North River, Jersey City, New Jersey, and was out of operation (R. 13). The only employee of the defendants aboard was a watchman (R. 135).

Walter Halecki, the plaintiff's decedent was an electrician employed by K & S Electrical Company (R. 69), a subcontractor engaged by Rodermond to do electrical work aboard the ship. Neither K & S nor Rodermond, both Jersey corporations (R. 16), are parties to this action. On September 29, 1951 the decedent came aboard the vessel together with a co-employee of K & S Electrical Company, one Donald Doidge. These electricians received their instructions from their employer, K & S Electrical Company, which had undertaken to perform electrical work on the ship, in accordance with specifications given it by Rodermond Industries, Inc. (R. 72). These specifications included cleaning the generators on the ship, which was the work performed by the decedent and Mr. Doidge on September 29, 1951 (R. 71-73).

Donald Doidge, who had previously given a deposition for the defendants, testified on behalf of the plaintiff at the trial. Mr. Doidge was the only factual witness intro-

duced by the plaintiff, and was the only person present at the time the work was done, in addition to the decedent.

Mr. Doidge, who was in charge of the work, testified that the date, the time and the manner in which this work was to be done, were left to his discretion (R. 11-13), and that the customary method for cleaning generators was by use of carbon tetrachloride (R. 11). On September 28, 1951, the day before the work was actually done, Doidge and Halecki set up the equipment which was to be used, including air hoses and an electric blower, supplied by Rodermond (R. 12). The power was produced by shore generators, owned by Rodermond, as the "New Jersey" was a dead ship, i.e., it did not produce its own power (R. 12-13).

On the morning of September 29, 1951, the K. & S employees, under the supervision of Mr. Doidge, set up portable blowers in the engine room where they were working, and also brought gas masks with them, as the cleaning of the generators was done by spraying them with carbon tetrachloride (R. 98-99). The engine room where this work was done was only one level below the main deck, and both doorways and the skylight were open (R. 6-15). The ship's ventilation system was operated by power from a generator on shore (R. 7-8).

Mr. Doidge testified that the decedent did most of the actual spraying, and that he wore a gas mask during the performance of the work, which continued uneventfully from 8:30 A.M. to 4:00 P.M. The decedent left Mr. Doidge without making any complaint other than that he had a peculiar taste in his mouth (R. 10-11).

Mr. Halecki became ill at home, and on October 2, 1951, was admitted to the Medical Center in Jersey City, where

he died on October 12, 1951. The hospital record stated that the cause of death was carbon tetrachloride poisoning, and the record also disclosed that the decedent had habitually consumed excessive amounts of alcohol (R. 17-18).

Mr. Doidge testified that all of the equipment and ventilation systems had operated perfectly during the day (R. 12-16), and that in his opinion the ventilation was adequate (R. 13), and also that he and the decedent had used carbon tetrachloride on many occasions, and were completely familiar with its properties (R. 11) (R. 104).

Robert Gaines, a bio-chemist, testified as an expert on behalf of the plaintiff, regarding the qualities of carbon tetrachloride, and the degree of concentration necessary to produce a dangerous condition (R. 18-19). Mr. Gaines had never been aboard the pilot boat "New Jersey" (R. 28), and his testimony as an expert was based upon the description of the engine room given by witness, Donald Doidge, and also upon certain photographs of the engine room which had been introduced (R. 19).

Mr. Gaines testified that a safe concentration of carbon tetrachloride was 100 parts per million (R. 18), and that in his opinion, a concentration of 20,000 parts per million existed in the engine room of the pilot boat "New Jersey" (R. 23). Upon cross-examination, Mr. Gaines admitted that the concentration of carbon tetrachloride would depend upon such factors as the horse power of the ventilator motors (R. 28), the location of the ducts, the size and angle of the fan blades (R. 30), the location of exhaust vents, the size and arrangement of portable blowers and air hoses (R. 28), and the condition of the gas mask used (R. 30). The witness further testified that these factors, which

were unknown to him, were essential in estimating the concentration (R. 31).

The defendants introduced the testimony of William M. Finkenaaur, a marine engineer who had actually tested the ventilation system aboard the vessel. Mr. Finkenaaur testified that the system was entirely adequate and efficient to perform the function for which it was designated (R. 40).

The defendants also produced as an expert witness, Dr. Milton Helpern, the New York State Medical Examiner, who emphasized that a person who drinks to excess has a strong pre-disposition to carbon tetrachloride poisoning (R. 37). Dr. Helpern reviewed the medical records of the decedent, and stated, that in his opinion, Mr. Halecki's history of alcoholism created a susceptibility to a slight exposure of the substance (R. 39).

The case was tried before the Honorable Edward Weinfeld and a jury in December, 1956, and January, 1957, and resulted in a jury verdict in favor of the plaintiff in the total amount of \$65,000 (R. 64). After judgment was entered, the defendants filed a Notice of Appeal to the United States Court of Appeals for the Second Circuit (R. 67).

The appeal was argued in the United States Court of Appeals for the Second Circuit on November 21, 1957, before Circuit Judges Hand, Lumbard and Hincks. On January 10, 1958, the opinion of the Court of Appeals was handed down and judgment entered. The majority, consisting of Circuit Judges Hand and Hincks affirmed the judgment of the District Court (R. 147), and Circuit Judge Lumbard dissented (R. 154).

The majority opinion delivered by Circuit Judge Hand held that the decedent performed the type of work which

entitled him to the warranty of seaworthiness, and that the New Jersey Death Statute was broad enough to encompass a claim for unseaworthiness. The majority also held that the Trial Court properly applied the maritime rule of comparative negligence rather than the state doctrine of contributory negligence. The majority rejected the appellant's contention that the record below was insufficient to support the jury verdict.

The dissenting opinion of Circuit Judge Lumbard held that the decedent's work as a shoreside electrician was not that traditionally done by seamen, and he therefore was not entitled to the warranty of seaworthiness. Circuit Judge Lumbard also disagreed with the majority's view that a maritime claim brought pursuant to the New Jersey Death Statute was not subject to the defense of contributory negligence.

Subsequently, on January 24, 1958, the petitioner filed a petition for re-hearing (R. 163) and a petition for hearing *en banc* (R. 169), together with a motion to stay the mandate. The petition for re-hearing was denied on January 31, 1958, with Circuit Judge Lumbard dissenting. The petition for hearing *en banc* was denied on February 20, 1958, again over the dissent of Circuit Judge Lumbard. The motion to stay the mandate was unanimously granted on February 27, 1958. The petition for a writ of certiorari was filed on April 28, 1958, and was granted on June 9, 1958.

SUMMARY OF ARGUMENT

POINT I

The State rule of contributory negligence should be applied to an action under a state wrongful death act.

This respondent sued under the New Jersey Wrongful Death Act, as the General Maritime Law contains no provision for a death action. Her rights, as the administratrix of a fatally injured shore worker, are therefore derived solely from the state statute. *Lindgren v. United States*, 281 U. S. 38 (1930).

Admiralty Courts recognized that the General Maritime Law has been supplemented by State Death and Survival Statutes, which supply rights not given by Maritime Law. *Western Fuel v. Garcia*, 257 U. S. 233 (1921); *Just v. Chambers*, 312 U. S. 383 (1941).

The question then arose as to whether Federal Courts would enforce these state created rights in accordance with state or maritime rules. This Court has decided that the validity of state created rights would be determined in accordance with state substantive law. *The Harrisburg*; 119 U. S. 199 (1886).

It has been specifically held that suits brought under a state wrongful death act must be subject to the limitations contained in the state law which created the right. *Western Fuel v. Garcia*, 257 U. S. 233 (1921); *Levinson v. Deupree*, 345 U. S. 648 (1953).

The particular question in the instant case is whether the maritime rule of comparative negligence or the State

principle of contributory negligence should be applied to an action under a wrongful death act. An explicit answer has been given by the various Circuit Courts of Appeal, which have almost uniformly applied the state rule of contributory negligence to actions brought to enforce state given rights.

Graham v. Lusi Ltd., 206 F. 2d 223 (CA-5, 1953) *Hartford Accident Indemnity Company v. Gulf Refinery Company*, 230 F. 2d 346 (CA-5, 1956); *Lee v. Pure Oil Company*, 218 F. 2d 711 (CA-6, 1955).

Of particular significance is the decision of *Hill v. Waterman*, 251 F. 2d 655 (CA-3, 1958), in which the Third Circuit decided that contributory negligence should be a defense to an action brought under the New Jersey Wrongful Death Act.

Hill was decided by the Third Circuit shortly after the *Halecki* decision was handed down. The Second Circuit in *Halecki* had relied upon the holding in *Skorogard v. The M/V Tungus*, 252 F. 2d (CA-3, 1957), in finding that the New Jersey Death Statute encompassed unseaworthiness. However, the *Halecki* decision took the additional step of applying comparative negligence, which was expressly rejected by the Third Circuit in *Hill v. Waterman*.

The Courts have followed the general rule of determining the rights of litigants in accordance with the substantive law of the jurisdiction in which each right originates. Equal protection has been given to state and federal created rights.

Garrett v. Moore McCormack, 317 U. S. 239 (1942):

There is no question that contributory negligence is a complete bar to recovery in New Jersey. *Blaker v. The Receivers of the New Jersey Midland Railroad Company*, 30 N. J. Eq. 240 (1878).

The decision of this Court in *Pope and Talbot v. Hawn*, 346 U. S. 406 (1953), has been cited as authority for applying the maritime rule of comparative negligence to the instant case. However, Hawn was an injured but living plaintiff, and it is not disputed that his rights, to sue for negligence and unseaworthiness, were given by Maritime law. Hawn, unlike Halecki, was not required to rely on a state created right, and therefore was not bound by state limitations.

The right of this respondent was created by the state death statute, and was not rooted in federal maritime law. Again, the substantive law to be applied in each case depends on the origin of the right.

The *Hawn* decision was consistent with this principle, and is not authority for applying the maritime comparative negligence rule to an action brought under a State Death Statute.

Moreover, the nature of the right given by a Wrongful Death Statute is completely different from the rights given a living claimant by the General Maritime Law. An injured person sues for his own damages, including his pain and suffering, lost income and medical expenses. A Lord Campbell's Act, on the other hand, gives to a decedent's dependents the right to sue for their own damages, consisting of the loss of anticipated income suffered because of the death.

The distinction between these rights is emphasized by the existence of both wrongful death statutes and survival statutes, which preserve the rights a decedent had prior to his death. It is significant that this claimant sued only under the Wrongful Death Act of New Jersey, and not under the New Jersey Survival Statute.

Litigants will not receive equal protection of the law unless their rights are determined in accordance with the jurisdiction where they originated. The obligations of this defendant are imposed upon it by state law, which would also be the source of that defendant's rights. The application of the maritime rule of comparative negligence would deprive this and other marine defendants of a defense given to every other party sued under the state death statute.

Persons engaged in the maritime industry thereby become the only class of litigants to bear the obligations imposed by state law without the protections of that law.

Moreover, a person suing under the Wrongful Death Act because of the death of a maritime employee would receive preferential treatment over other claimants, suing under the same statute, as a result of fatal injuries suffered ashore.

POINT II

The New Jersey Wrongful Death Act does not give a cause of action for unseaworthiness.

There is no cause of action for wrongful death under the General Maritime Law, *The Harrisburg*, 119 U. S. 199 (1886), and a claimant seeking damages for maritime injuries resulting in death may sue under the Wrongful Death Act of the state within which the accident occurred. *Western Fuel v. Garcia*, 257 U. S. 233 (1921).

This claimant sued under the New Jersey Wrongful Death Act, N.J.S.A. 2:3;-1 through 6, for pecuniary damages resulting from the death of the decedent, and can only rely on rights created by state law.

It is the position of the petitioner that the New Jersey Wrongful Death Act does not afford a right to sue for unseaworthiness. The language of the statute, the nature of the rights to be enforced, the intent of the legislature, and the applicable decisions all fail to support the interpretation of the respondent.

The language of the statute gives an action based on "act, neglect or default", and the *Halecki* opinion held that these words encompass unseaworthiness. However, the elements of unseaworthiness are fundamentally different from those of negligence, which depends on such factors as lack of due diligence, notice and control. None of these elements are necessary to establish unseaworthiness. *Seas Shipping v. Sieraeki*, 328 U. S. 85 (1946); *Alaska Steamship Co., Inc. v. Petterson*, 347 U. S. 396 (1954); and

Boudin v. Lykes Brothers Steamship Co., Inc., 348 U. S. 336 (1955).

It has also been argued that the decedent's dependents should receive the same right to sue for unseaworthiness that he would have had if he had lived. This argument ignores the basic difference between the rights of an injured but living party, and the rights given to his dependents.

An injured litigant has a maritime right to sue for his own damages, consisting of his pain and suffering, lost income and medical expense. However, his dependents have a separate right, to recover their damages, caused by the decedent's death. This cause of action, to recover for loss of anticipated support, does not exist at Maritime Law, and does not come into being until the decedent's death.

Curtis v. Garcia, 241 F. 2d 30 (CA-3, 1957).

The fact that the New Jersey Wrongful Death Act was not intended to preserve a decedent's rights for his dependents is demonstrated by the existence of a separate New Jersey Survival Statute. This Act preserves the already existing rights of the decedent, while the Wrongful Death Act creates a new cause of action, which did not exist under General Maritime Law.

Just v. Chambers, 312 U. S. 383 (1941);

Turon v. J. & L. Construction Company, 8 N. J. 543, 86A. 2d 192 (Supreme Court, N. J. 1952).

In considering whether New Jersey Legislature intended to include unseaworthiness within the meaning of the Wrongful Death Act, it is important to bear in mind that

the Act, in its present form, was enacted in 1937, and was patterned upon the British Lord Campbells' Act of 1848. The protection of the warranty of seaworthiness was extended to a non-seaman for the first time in 1946, by the decision of this Court in *Sieracki v. Seas Shipping Company*, 328 U. S. 85 (1946).

Therefore, at the time this law was passed, shore workers had no right to sue for unseaworthiness. The legislature could not have intended to include in the Statute a right which did not exist at the time the law was enacted.

The New Jersey Courts which have considered the Wrongful Death Act have consistently confined its application to negligence situations. This has been true even where the facts would support a claim of unseaworthiness. *Moran v. Moore McCormack Lines*, (1944) 131 N.J.L. 332, 35A. 2d 415; *Santa Maria v. Lamport & Holt Line, Ltd.* (E.A. 1938) 119 N.J.L. 467, 196 Atl. 706.

Moreover, the Federal Courts, in considering similar statutes of other states, have uniformly held that they apply to actions for negligence, and not to unseaworthiness. *Graham v. Lusi*, 206 F. 2d 233 (CA-5, 1953); *Lee v. Pure Oil Company*, 218 F. 2d 711 (CA-6, 1955); *Byrd v. Napoleon Avenue Ferry Company, Inc.*, 125 F. Supp. 573 (E.D.La), 227 F. 2d 958 (CA-5, 1955), cert. den. 351 U. S. 925.

POINT III

The warranty of seaworthiness does not extend to Halecki.

It is the respondent's position that Halecki, an electrician employed by a sub-contractor to clean generators, was not doing the type of work which entitled him to the warranty of seaworthiness.

This doctrine was first extended to nonseamen by this Court in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946). There it was held that longshoremen, engaged in loading a vessel, are performing seamen's work, and that they are therefore entitled to the same protection. The Court reasoned that a shipowner should not be allowed to avoid liability to those engaged in ship's service by arranging to have the work done by independent contractors.

The decisions which followed *Sieracki* expanded the warranty of seaworthiness to include, not only longshoremen, but other harbor workers, whose duties, like those of seamen, were performed in the service of the ship.

In each instance, the determination depended upon the type of work done by the injured person, and was not based on the name given to his calling or trade.

This criterion was followed by this Court in *Pope & Talbot v. Hawn*, 346 U. S. 406 (1953). Hawn was a carpenter, employed by an independent contractor to repair grain loading equipment so that the loading of the vessel could continue.

Mr. Justice Black, writing for the majority of this Court, emphasized that Hawn's work was preparing the

ship for the carriage of cargo, and that his function was similar to that of a longshoreman. In giving Hawn a cause of action for unseaworthiness, the Court stressed that his work was connected with the operation of the ship.

This Court expressly refrained from a general extension of the warranty of seaworthiness to cover all shore-side workers or repair men. The test continued to be the nature of the injured person's work.

The lower Court decisions have regularly observed this test. The warranty has extended to carpenters like Hawn, who was preparing the ship to receive cargo, and also to ship's cleaners, whose function was to clean the vessels' cargo compartments or tanks in preparation for loading. *Torres v. The Kastor*, 227 F. 2d 664 (CA-2, 1955); *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 784 (CA-3, 1953).

On the other hand, when the work done by the injured person was not in the ship's service, the Courts have declined to extend the warranty. The function of the worker was examined in each case, and no cause of action for unseaworthiness was given where the duties were not those traditionally performed by seamen.

Thus, the warranty has been withheld from repair yard employees, engineers, and ship's riggers, whose jobs were specialized and involved mechanical or structural repairs. *Berryhill v. Pacific Far East Lines, Inc.*, 238 F. 2d 385 (CA-9, 1957), cert. den. 1 L. Ed. 2d 1537; *Petersen v. United States*, 80 F. Supp. 84 (E.D.N.Y. 1947); *Meyers v. Pittsburgh Steamship Company*, 165 F. 2d 642 (CA-3, 1948). Circuit Judge Hand, who wrote the majority opinion in *Halecki*, agreed that the test to be observed was the nature

of the work performed. However, he stated that he saw no difference between the work done by Halecki and that done by Hawn.

It is respectfully submitted that Halecki's work was completely unlike that done by Hawn, or by any other worker to whom the warranty of seaworthiness has been extended. Halecki was a trained and specialized electrician, who ordinarily worked ashore. The very nature of the task of cleaning generators required that the ship be out of operation, and the power was in fact off when Halecki worked on the ship.

Moreover, Halecki's job required special equipment, owned by his employer, which was engaged by the repair yard as a sub-contractor, because the work was so specialized that the repair yard was itself not equipped to perform it.

In extending the doctrine to apply to Halecki, the majority opinion characterized the decedent's work as "cleaning the ship". However, Halecki's work of removing grease from the ship's generators by spraying them with carbon tetrachloride was totally unlike the work done by ship's cleaners, who were hired to clean the vessel's cargo compartments in preparation for the reception of cargo.

The dissenting opinion of Circuit Judge Lombard in *Halecki* took particular exception to the characterization of Halecki as a "ship's cleaner", which he described as a play on words. He emphasized that Halecki, an outside specialist, did work which had never been done by seamen.

Judge Lombard also referred to the inconsistency shown by the result in *Berge v. National Bulk Carriers Corp.*

251 F. 2d 717 (CA-2, 1958), cert. den. 2 L. Ed. 2d, 1066, which was decided by the same panel of the Court of Appeals for the Second Circuit, on the same day as the *Halecki* decision was handed down. The Second Circuit, again speaking through Judge Hand, affirmed the dismissal of the complaint of Berge, a shipyard rigger, and found that he was not entitled to the protection of seaworthiness.

Further support for the contention that *Halecki* was not doing seamen's work is found by a comparison with *Berryhill v. The Pacific Far East Lines*, 238 F. 2d 385 (CA-9, 1957), cert. den. 1 L. Ed. 2d 1537. In refusing to extend the warranty, the Court pointed out that *Berryhill*, a repair man, was working on the ship's propeller shaft, and that the vessel's propulsion machinery was necessarily out of operation.

The nature of *Halecki's* work was also such that it could only be performed when the ship's power was off and the vessel was out of operation. Neither job could be done by seamen.

The *Berryhill* decision also demonstrated that a shipowner does not warrant the seaworthiness of equipment not usually furnished and necessarily required by the ship. Reference was made to the decision of this Court in *Pettersen v. Alaska Steamship Co.*, 205 F. 2d 478 (CA-9, 1953). There the owner was held liable for the unseaworthiness of a block which had been brought aboard the ship by the stevedoring company for use in loading the vessel.

However, the Ninth Circuit in *Berryhill* declined to hold the owner responsible for a defective grinding wheel which had been furnished by the shipyard where the vessel was being repaired. He distinguished between the block used

in the *Pettersen* case, which was similar to ship's equipment, and machinery like the grinding wheel.

Therefore, it does not seem that the *Pettersen* doctrine was intended to hold a shipowner liable for the inadequacies of specialized equipment brought aboard by subcontractors. Liability has been imposed in *Halecki* because of the alleged inadequacy of the ventilation equipment, including portable blowers, fans, air hoses and gas masks, all of which were brought aboard by the decedent, himself. None of this equipment, except the vessel's own permanent ventilators, was owned or supplied by the vessel, and none of it was connected to the operation of the vessel.

POINT IV

Respondent failed to establish the existence of a defective condition.

Regardless of the various legal issues discussed in this brief, petitioner contends that upon the trial there was a complete failure of proof of the existence of either negligence or unseaworthiness. It has been argued that the decision of this Court in *Schulz v. Pennsylvania Railroad Company*, 350 U. S. 523 (1956), was authority for submitting this case to the jury. However, a comparison of the facts discloses that the *Schulz* doctrine has no application in the instant case.

Although there were no witnesses to Schulz' death, the record contained evidence of several dangerous conditions which could have caused the fatal accident. This Court

held that the jury should have been permitted to decide which of several possible causes had brought about the accident.

However, the *Halecki* record did not contain proof of the existence of any dangerous condition, and the jury was first allowed to speculate upon the existence of a defect aboard the petitioner's vessel, and then to further surmise that this supposed condition caused the decedent's death.

The issue in *Halecki* was the adequacy and condition of a ventilation system on the vessel, as it existed on the day when the decedent worked aboard. The only factual witness on behalf of the claimant was the decedent's co-worker, who testified that the ventilation system was adequate, and was operating efficiently.

The plaintiff's expert witness testified that he had never been aboard the vessel and that he was without knowledge of any factors which he admitted were necessary to form an opinion of the conditions which existed, such as the dimensions, arrangement, location and condition of the equipment used. Furthermore, he specifically admitted on cross examination that he did not know whether the ventilation system aboard the ship was inadequate.

Although *Schulz* and other cases have demonstrated that a jury should be permitted to decide which of several possible inferences is the most reasonable, it has always been held that there must be some evidence upon which to base the inference. *Lavender v. Kurn*, 327 U. S. 645 (1946).

Moreover, it is basic that a hypothetical question must be based upon facts which are in evidence. Petitioner contends that the plaintiff's experts' testimony should have been excluded because of his admission that he could not answer without facts which were not within his knowledge, and upon which no testimony had been received. *Virginia Beach Bus Line v. Campbell*, 73 F. 2d 97 (CA-4, 1934).

The majority opinion in *Halecki* disposed of that portion of the appeal which was based on insufficiency by stating that the competence of the plaintiff's expert witness was within the discretion of the trial court, and cited cases where the qualifications of the experts had been questioned.

No question concerning the witnesses' qualifications have been raised by the petitioner, who contends that the record did not contain evidence sufficient to form a basis for the expert's opinion, and that this insufficiency was admitted by the witness himself.

Accordingly, the action should have been dismissed.

ARGUMENT

POINT I

The State rule of contributory negligence should be applied to an action under a state wrongful death act.

- (a) The Rights of Litigants should be Determined by the Substantive Law of the Jurisdiction in which Each Right Originates.**

This respondent, as the administratrix of a fatally injured shore worker, brought an action based solely on the New Jersey Wrongful Death Act, N.J.S.A. 2A:31-1 through 6, and any rights which she may have are derived from that statute. Resort to the state act was necessary because it has been firmly established that the General Maritime Law contains no provision for a death action. *The Harrisburg*, 119 U. S. 199 (1886); *Lindgren v. United States*, 281 U. S. 38 (1930). The source of the respondent's rights was therefore clearly not the General Maritime Law.

However, persons seeking damages for death resulting from Maritime tort have been permitted to rely upon rights given by the state within which the alleged wrongful act was committed, and Admiralty Courts have recognized state statutes and the rights which they supply. The General Maritime Law has been supplemented by the various state death and survival statutes, and it has been recognized that the state law thereby supplies rights not found in Maritime Law. *Just v. Chambers*, 312 U. S. 383 (1941); *Western Fuel v. Garcia*, 257 U. S. 233 (1921) and *The Hamilton*, 207 U. S. 398 (1907).

After it had been determined that Federal Courts would enforce these new rights which had been created by State Law, the question then arose as to whether their validity would be determined by state or maritime rules. This Court considered the source of the rights, and held that state substantive law should apply.

In *The Harrisburg, supra*, the Supreme Court of the United States unanimously ruled that an action brought under a state death statute was necessarily restricted by the State Statute of Limitations. After holding that the claimant had no cause of action at maritime law, and that his only right came from the State Death Act, Mr. Chief Justice Waite, stated at page 214:

"It would seem clear that, if the admiralty adopts the statute as a rule of right to be administered within its own jurisdiction, it must take the right subject to the limitations, which have been made part of its existence. . . ."

A similar fact situation was considered in *Western Fuel v. Garcia*, 257 U. S. 233 (1921), where this Court reversed a judgment in favor of a libellant who had sued under a State Wrongful Death Act, after the expiration of the State Statute of Limitations. Mr. Justice McReynolds, in enforcing the one year State Time Limitation, held that state law may modify or supplement Maritime law without interfering with its uniformity.

Again this Court looked to the origin of the right in determining the substantive law to be applied to an action under a state Wrongful Death Statute in *Levinson v. Deupree*, 345 U. S. 648 (1953), and held that "a time

limitation deemed attached to the right of action created by the state is binding in the federal forum" (p. 651).

This question has frequently arisen in the various Circuit Courts of Appeal which have almost uniformly followed the rule that admiralty courts will apply substantive state law when invoked to protect rights given by the State. A statement typical of this position was made by the Court of Appeals for the Fifth Circuit in *Graham v. A. Lusi Ltd.*, 206 F. 2d 223 (CA-5, 1953), which was brought under the Florida Death Statute. It was stated at page 225:

"We are in no doubt that the appellant's right of action under Section 768.01 N. S. A., like other rights of action arising in admiralty under Lord Campbell's Act and similar acts, is to be enforced according to the principles of the Common Law, and contributory negligence and the exercise of due care are absolute defenses thereunder. Without this statute, the appellant could not maintain her libel because the prior maritime law conferred no right upon the personal representative of a deceased maritime employee to recover indemnity for his death."

The same Circuit made similar decisions in *Hartford Accident & Indemnity Company v. Gulf Refinery Company*, 230 F. 2d 346 (CA-5, 1956); and *Byrd v. Napoleon Avenue Ferry Company, Inc.*, 125 F. Supp. 573 (E. D. La., 1954), aff'd 227 F. 2d 958 (CA-5, 1955), cert. denied 351 U. S. 925.

Identical results were reached by the Sixth Circuit in *Lee v. Pure Oil Company*, 218 F. 2d 711 (CA-6, 1955); and by the Third Circuit in *Klingseisen v. Costanzo Transportation Company*, 101 F. 2d 902 (CA-3, 1939); *Curtis v. Garcia*, 241 F. 2d 30 (CA-3, 1957), and *Hill v. Waterman*, 251 F. 2d 655 (CA-3, 1958).

Parenthetically, *Hill* was decided by the Third Circuit shortly after the *Halecki* decision was handed down. The Second Circuit in *Halecki* had relied heavily upon the Third Circuit holding in *Skovgaard v. The M/V Tungus*, 252 F. 2d 14 (CA-3, 1957), in finding that the N. J. Death Statute encompassed unseaworthiness. However, the *Halecki* decision took the additional step of applying comparative negligence, which was expressly rejected by the Third Circuit in *Hill v. Waterman, supra*.

The Courts have consistently applied the substantive law of the jurisdiction which created the right, whether state or maritime in origin. It is apparent that the force of the rule is felt in both directions, and that state rights, as well as federal, will be protected.

For example, *Garrett v. Moore-McCormick*, 317 U. S. 239 (1942), involved an injured seaman, suing under the Jones Act, in the State Court of Pennsylvania. Garrett's right clearly originated in the General Maritime Law, and it was held that State courts must enforce substantive rights arising from admiralty law in accordance with maritime principles. The opinion, delivered by Mr. Justice Black, demonstrated the Court's intention to protect substantive rights rooted in state law, as well as those created by Maritime Law. It was stated at page 245:

"The constant objective of legislation and jurisprudence is to assure litigants full protection for all substantive rights intended to be afforded them by the jurisdiction by which the right itself originates. Not so long ago we sought to achieve this result with respect to enforcement in the federal courts of rights created or governed by State law (*Erie Railroad Co. v. Tompkins*, 304 U. S. 64). And Admiralty Courts

when invoked to protect rights rooted in state law, endeavor to determine the issues in accordance with the substantive law of the state."

The *Garrett* opinion referred with apparent approval to *Erie Railroad v. Tompkins*, 304 U. S. 64 (1938), as did *Pope & Talbot v. Hawn*, 346 U. S. 406, (1953), *Erie Railroad*, which outlined the relationship between state and federal law, also involved the validity to be given by a federal diversity court to a defense afforded by state law. Stated briefly, it was held that federal district diversity courts must try state created causes of action in accordance with state laws.

This principle is not inconsistent with this Court's holding that maritime rights must not be subordinated to state common law. *Southern Pacific Co. v. Jensen*, 244 U. S. 205 (1917). There is no contradiction among these decisions, as each right is enforced in accordance with its origin.

Therefore, petitioner respectfully submits that Halecki's rights should have been decided in accordance with the state law which created those rights. It is settled law in New Jersey that contributory negligence is a complete bar to recovery. *Blaker v. The Receivers of the New Jersey Midland Railroad Company*, 30 N. J. Eq. 240 (1878); *The New Jersey Express Company v. Nichols*, 33 N. J. L. 434 (1867); *Donus v. Public Service Railway*, 102 N. J. L. 644 (1926).

Erie Railroad v. Tompkins, *supra*, made it clear that the judicial decisions of state law are to be as binding as the legislation of a state. It was stated at page 78 of the *Erie Railroad* opinion:

"Except in matters governed by federal constitution or by acts of congress, the law to be applied in any case is the law of the state. And whether the law of the state shall be declared by its legislature in a statute or by its highest court in a decision is not a matter of federal concern."

(b) The Decision in *Pope and Talbot v. Hawn* did not Change the Rule that the Source of a Right must Determine the Law to be Applied.

Circuit Judge Hand, in the *Halecki* majority opinion, agreed that contributory negligence had been a complete defense to an action brought under a Lord Campbell's Act because of a maritime tort (R. 152). However, referring to dictum in *O'Leary v. U. S. Lines*, 215 F. 2d 708 (CA-1, 1954), Judge Hand held that this principle had been changed by the ruling of this Court in *Pope and Talbot v. Hawn*, 346 U. S. 406 (1953), where a carpenter sued for injuries sustained aboard ship. It was found that Hawn's right to sue for negligence and unseaworthiness was rooted in Federal Maritime Law, and that the Federal Rule of comparative negligence should be applied. Particular reliance was placed upon the following language of the majority opinion in *Hawn*, pages 409-410:

"The right of recovery for unseaworthiness and negligence is rooted in Federal Maritime Law. Even if Hawn were seeking to enforce the state created remedy for this right, federal maritime law would be controlling. While states may sometimes supplement Federal Maritime policies a state may not deprive a person of any substantial admiralty rights as defined by acts of Congress, or interpretative opinions of this Court."

Mr. Justice Black, who delivered the *Hawn* opinion, cited as his authority for the above statement the case of *Garrett v. Moore McCormack*, 317 U. S. 239 (1942). That opinion, which was also written by Mr. Justice Black, distinguished between rights originating in Maritime Law and those rooted in state law and held that substantive rights are to be enforced in accordance with the jurisdiction in which the right originates. This statement, which we have quoted previously in this brief, emphasized that admiralty courts will protect rights rooted in state law as well as those created by Maritime Law.

These statements, when read together, leave no doubt that Mr. Justice Black did not intend that an action under a state wrongful death statute should be controlled by the principles of the General Maritime Law.

Byrd v. Napoleon Avenue Ferry Company, Inc., 125 F. Supp. 573 (E. D. La., 1954), aff'd 227 F. 2d 958 (CA-5, 1955), cert. denied 351 U. S. 925.

The petitioner respectfully contends that the *Hawn* decision, and the statement quoted above, are completely consistent with the prior rulings of this Court, and with the position taken by this petitioner. No change was made in the principle that a right is to be enforced in accordance with the substantive law of the jurisdiction in which it originated.

Again, the test is the origin of the right. *Hawn* was an injured but living plaintiff, and it is not disputed that his right to sue for negligence and unseaworthiness was given by maritime law. As such, the extent of his right was correctly measured by the admiralty rule of comparative negligence.

Hawn, unlike Halecki, was not required to rely upon a state created right, and therefore was not bound by State limitations. It is interesting to note that the sentence of the *Hawn* opinion immediately preceding the portion quoted in *Halecki*, stated:

"Hawn's complaint asserted no claim created by or arising out of Pennsylvania law." (Page 409) |

The respondent's right in *Halecki* is entirely different from that of *Hawn*, both in origin and in nature. The state death statute gives the decedent's family a right to sue for the pecuniary loss it suffered as a result of the death, and this right could not come into existence until after death. Hawn's right, to sue for his own pain and suffering, lost income and other damages, while living, was clearly given by the General Maritime Law.

There is nothing incongruous in applying comparative negligence to the right of a living claimant, and in applying contributory negligence to the rights of his dependents. The State Wrongful Death Act creates a new right of action, not for the injury to the deceased, whose own right came from the Maritime law, but for the injury to those who suffered loss by reason of the death. *Curtis v. Garcia*, 241 F. 2d 30 (CA-3, 1957).

Therefore, it seems clear that Mr. Justice Black was not referring to a State Death Action in the statement quoted in *Halecki*. "Even if Hawn was seeking to enforce a state created remedy for this right, Federal Maritime law would be controlling." (R. 153)

Again, the "right" to sue for maritime injuries originated in admiralty, and Maritime law would be controlling,

no matter what remedy Hawn used to enforce that right. Hawn could have sued in a state court, under the savings to suitors clause. Moreover, if he had died, his estate could have preserved his maritime rights by resort to the State Survival Statute. *Just v. Chambers*, 312 U. S. 383 (1941).

In either case, the origin of Hawn's rights would remain maritime, and the use of the remedy would not affect the application of Maritime law. Therefore, this statement is not inconsistent with the petitioner's position.

Survival statutes, including that of New Jersey, Revised Statutes of New Jersey, 2A :15-2; N.J.S.A. 2A :15-2, afford a remedy for enforcing already existing rights, to recover for damages suffered by the decedent prior to his death. These rights vest in the decedent's estate, and have their origin in the General Maritime Law. It is completely consistent to measure them by the admiralty rule of comparative negligence. *Curtis v. Garcia, supra*.

The very existence of both wrongful death statutes and survival statutes emphasizes that an injured person's own rights are distinct from the right of his family to recover for their damages, resulting from his death. The survival statute merely preserves an existing right originating in General Maritime Law, while the death act creates a new right, which did not previously exist. It is significant that Halecki sued only under the wrongful death act of New Jersey, and not under New Jersey Survival Statute.

The effect of the *Hawn* decision was considered by the Third Circuit in *Curtis v. Garcia (supra)*, and later by the majority opinion in *Halecki*. The *Curtis* opinion at page 34, pointed out the distinction between Hawn's rights and

those of the administratrix, in a statement which would be fully applicable to *Halecki*:

"Hawn had a right of action, independent of any Pennsylvania law, because his injury resulted from a maritime tort and was not fatal. Here, the injuries were fatal and neither the administratrix nor those for whose benefit her claim under the wrongful death statute is asserted had any right of action, under maritime law, to recover damages for the decedent's death, even though it resulted from a maritime tort. She did not seek to enforce any maritime right by a state created remedy. . . .

The test is whether the right is one rooted in the general maritime law or one rooted in the state law. When the origin of the right has been determined, the court, federal or state, must apply the law of that jurisdiction in which that right originated. This plaintiff, in seeking recovery under the wrongful death statute, undertakes the enforcement of a right which is neither rooted in nor recognized by the maritime or the common law, but is wholly state created."

The *Halecki* decision referred to dictum contained in the majority opinion in *O'Leary v. U. S. Lines Company*, 215 F. 2d 708 (CA-1, 1954). The dissent of Judge Hartigan in that case thoroughly reviewed the authorities, and took sharp exception to the majority's interpretation of *Hawn*. A clear distinction was drawn between the rights of Hawn which were "rooted in maritime law" and those of claimants under state death statutes which are state created.

Therefore, it is the position of the petitioner that *Pope and Talbot v. Hawn*, *supra*, which was the sole authority relied upon by the majority in *Halecki* in applying comparative negligence, has not changed this court's policy of

protecting rights rooted in state law. The rights of litigants are still to be enforced in accordance with the substantive law of the jurisdiction in which those rights originated, and more specifically, the rights of parties to an action under a state death act should be determined by the state rule of contributory negligence.

(c) Litigants will not Receive Equal Protection of the Law Unless Their Rights are Determined by Their Origin.

It has been suggested that adherence to the principles of determining rights in accordance with their origin would bring about inequities and lack of uniformity. However, the facts of the *Halecki* case demonstrate that the reverse is true.

The obligations of this defendant are imposed upon it by state law, which, in justice and reason, should also be the source of the defendant's rights. The application of the maritime rule of comparative negligence would deprive this and other marine defendants of a defense given to every other party sued under the state death statute.

Persons engaged in maritime industry thereby become the only class of litigants to bear the obligations imposed by state law without the protections contained in that law. It is respectfully contended that state law should not be applied piece meal with reliance only on that portion which aids one party. The rights of defendants should be protected as zealously as the rights of claimants.

Conversely, the decision of the majority in *Halecki* would clearly prevent the equal application of the state law to all claimants. A person suing under the Wrongful Death Act because of the death of a maritime employee would receive

benefits not given to a party, suing under the same statute, whose decedent was injured ashore.

This incongruity was pointed out in *O'Leary v. U. S. Lines Co.*, *supra*, in the dissent of Judge Hartigan, who referred to the Harvard Law Review article entitled *Erie Railroad v. Tompkins* and The Uniform General Maritime Law (Stevens), 64 Harvard Law Review 246. The article stated at page 266:

"As the state statute—adopted by admiralty—created the rights of the parties, the state law should be referred to in order to determine the validity of the claim, even though these rights are derived from death resulting from a maritime tort. A contrary result will enable the admiralty courts to apply maritime rules to the state created right—such as the rule for divided damages instead of the defense of contributory negligence. As a result, parties asserting rights under the statute arising from a maritime tort would get preferential treatment as compared to parties claiming rights under the same statute because of a terrene tort."

POINT II

The New Jersey Wrongful Death Act does not give a cause of action for unseaworthiness.

(a) The Claimant's Rights Are Derived Only from State Law, As The General Maritime Law Does Not Provide For a Wrongful Death Action.

It is not disputed that there is no cause of action for wrongful death under the General Maritime Law. *The Harrisburg*, 119 U. S. 199 (1886); *The Hamilton*, 207 U. S. 398 (1907); *Lindgren v. United States*, 281 U. S. 38 (1930).

It is also firmly established that a claimant seeking damages for maritime injuries resulting in death may sue under the wrongful death act of the state within which the accident occurred, and moreover federal courts have been given jurisdiction of suits under state death statutes. *Levinson v. Deupree*, 345 U. S. 648 (1953); *Western Fuel Company v. Garcia*, 257 U. S. 233 (1921).

This claimant, therefore, could only rely upon rights created by state law, and brought an action pursuant to the New Jersey Wrongful Death Act, N.J.S.A. 2A:3-1 through 6. The administratrix sued only for pecuniary damages resulting from the death of the decedent, and did not bring an action under the New Jersey Survival Statute.

Aside from the questions of the decedent's right to the warranty of seaworthiness, which is discussed elsewhere in this brief, there is the issue as to whether the New Jersey Wrongful Death Act is broad enough to encompass a death claim allegedly resulting from unseaworthiness. In determining the scope of this statute, consideration must be paid to all available guides, including the language of the statute, the nature of the right, the intent of the legislature, and the applicable decisions.

(b) The Language Of The Statute Is Not Broad Enough To Encompass Unseaworthiness.

The majority opinion in *Halecki*, in holding that an unseaworthiness claim could be brought under the New Jersey Wrongful Death Act, found that the words "act, neglect or default" contained in this statute are broad enough to include unseaworthiness. In order to rationalize this interpretation, it appears necessary to consider "unseaworthiness" and "negligence" as synonymous terms.

However it has long been recognized that the elements of unseaworthiness are fundamentally different from those of negligence. It is not appropriate to review here the judicial evolution of unseaworthiness liability, but a cursory consideration of the decisions demonstrates the distinction.

Seas Shipping v. Sieracki, 328 U. S. 85 (1946) has often been quoted as an authority for the proposition that unseaworthiness is distinct from and not dependent upon negligence. Mr. Justice Rutledge, in discussing the nature of unseaworthiness, at page 94, stated:

"It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character."

The establishment of negligence on the part of a defendant depends on such factors as the lack of due care, failure to act reasonably, notice and control. However, none of these elements are essential in proving unseaworthiness, which is a completely distinct type of liability.

Although there are many fact situations which can spell out either negligence or unseaworthiness, the terms cannot be used interchangeably. This was demonstrated in *The Osceola*, 189 U. S. 158 (1903) which recognized unseaworthiness liability, and at the same time denied recovery for negligence. As the concept of unseaworthiness developed through successive decisions, it became clear that the courts did not intend that the elements of negligence should be necessary to establish unseaworthiness.

Any similarity to negligence was eliminated by this Court in *Mahnich v. Southern Steamship Co.*, 321 U. S. 96 (1944), when it was established that a shipowner's duty to furnish a seaworthy vessel is absolute, not predicated on negligence and not satisfied by the exercise of due diligence.

Moreover, unlike a plaintiff seeking to prove negligence, a party suing for unseaworthiness need not establish that the defendant had notice of the defective condition. This distinction was pointed out by Chief Judge Denman of the United States Court of Appeals for the Ninth Circuit in *Lahde v. Society Armadora del Norte*, 220 F. 2d 357 (CA-9, 1957).

Judge Denman relied upon the decision of this Court in *Boudoin v. Lykes Brothers SS Co., Inc.*, 348 U. S. 336 (1955), in which liability for assault was imposed on an unseaworthiness theory, although there was no evidence that the shipowner could have known of the vicious character of the assailant.

Another traditional component of negligence is the factor of control. A defendant cannot be held liable for negligence unless it was in control of the premises or the appliance involved. Often cited for this principle is the New York case of *Cullings v. Goetz*, 256 N. Y. 287 (1931), in which Chief Judge Cardozo states: "Liability in tort is an incident to occupation or control."

In *Caldarola v. Eckert*, 332 U. S. 155 (1947), this Court also stated that liability for negligence could arise only when there was possession and control of the premises on which the injury occurred. However, control is not an essential element in establishing unseaworthiness, accord-

ing to *Alaska SS Co., Inc. v. Petterson*, 205 F. 2d 478 (CA-9, 1953), aff'd 347 U. S. 396 (1954), in which this Court affirmed judgment in favor of the libelant, a stevedore injured by defective equipment brought on board the vessel by the stevedoring company. The Ninth Circuit, again speaking through Chief Judge Denman, agreed that control of the vessel had been given up by the shipowner at the time of the accident, and specifically ruled that the vessel owner was liable for unseaworthiness, even though not in control of the ship.

Therefore, petitioner respectfully contends that to include a suit for unseaworthiness in the purview of the New Jersey Wrongful Death Act would be to ignore the basic distinction between unseaworthiness and negligence.

(c) The Rights Given By The New Jersey Wrongful Death Act Are Distinct From Those Of A Living Claimant.

Considering further the language of the Statute, counsel for the respondent has attached significance to the use of the words, "such as would", used in the following context:

"When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, notwithstanding the death of the person injured and although the death was caused under circumstances amounting in law to a crime." N. J. Wrongful Death Act, N.J.S.A. 2A:31-1 through 6.

Counsel argues that the decedent would have had a cause of action for unseaworthiness if he had lived, and therefore, these words were intended to give that cause of action to the decedent's dependents.

This argument disregards the basic difference between the rights of a living party, injured by a maritime tort, and the rights given to the dependents of a decedent. An injured litigant has a maritime right to sue for his own damages, consisting of his pain and suffering, lost income and medical bills.

However, those dependent upon a deceased person are given by statute rights which did not exist, either at Maritime or common law. This cause of action, to recover the loss of financial support suffered by the family, does not come into existence until the decedent's death, and is given, not to the estate, but to the dependents, *Curtis v. Garcia*, 241 F. 2d 30 (CA-3, 1957).

The fact that the New Jersey Wrongful Death Act was not intended to preserve a decedent's right for his dependents is demonstrated by the existence of a separate New Jersey survival statute, upon which this claimant did not rely in the complaint.

This survival statute, Revised Statutes of New Jersey, 2A:15-2; N.J.S.A. 2A:15-2, states:

"Executors and Administrators may have an action for any trespass done to the person or property, real or personal, of their testator or intestate against the trespasser, and recover their damages as their testator or intestate would have had if he was living."

A cause of action is thereby given to the estate of a decedent to recover the damages the decedent himself suffered prior to his death. A fatally injured person's own right to recover for his pain and suffering, and other damages, would in the absence of the statute, die with him. *Just v. Chambers*, 312 U. S. 383 (1941). No new rights are created by survival statutes, which merely supply a remedy for enforcing already existing rights, *Soden v. Trenton & Mercer Traction Company*, 101 N. J. L. 393, 127 Atl. 558 (1925); *Hickman v. Taylor*, 75 F. Supp. 528, aff'd 170 F. 2d 327 (CA-3, 1948), cert. den. 336 U. S. 906.

A Wrongful Death Act, on the other hand, creates a new cause of action, which did not exist under the General Maritime Law. This statute gives the beneficiaries a recovery for the loss of anticipated support which they suffered because of the decedent's death, and has no relationship to the decedent's pain and other damages suffered before he died. *Turon v. J. & L. Construction Company*, 8 N. J. 543, 86 A. 2d 192 (1952).

The British Lord Campbell's Act (9-10 Vict. C. 93) which was the model for the New Jersey and other death statutes, contains almost identical language, including the "such as would" phraseology relied upon by libellant-respondent's counsel. However, it has been held that the British Act creates a new right for the beneficiaries, and does not merely preserve the injured person's own rights.

The distinction between wrongful death acts and survival statutes is defined by the English Court in *Blake v. Midland Railway Company*, 18 Q. B. 93, 110, 29 L. J. Q. B. 233, 16 Jur. 562 (1852).

Accordingly, it is respectfully submitted that the language of the statute, including the "such as would" clause,

fails to support the libellant-respondent's contention that the Wrongful Death Act encompasses the right to sue for unseaworthiness.

(d) The New Jersey Legislature Could Not Have Intended The Wrongful Death Act To Include Unseaworthiness.

Legislative intent is of course an important guide in determining the scope of a statute. A consideration of the date on which the New Jersey Act was passed makes it difficult to argue that the New Jersey State Legislature could have intended that the Act include a right to sue for unseaworthiness.

The statute was enacted in its present form in 1937, and was patterned almost verbatim upon the British Lord Campbell's Act of March 1848. Even at the time of the Law's most recent enactment, the right to sue for unseaworthiness belonged only to seamen, and not to shore workers. This right to a seaworthy vessel was extended to a non-seaman for the first time in 1946, by the decision of this Court in *Sieracki v. Sea Shipping Company*, 328 U. S. 85 (1946).

Therefore, the 2nd Circuit in *Halecki* attributed to the New Jersey Legislature an intent to include in the statute a right which did not exist at the time the Law was enacted. The Legislature then could not possibly have anticipated a death action, by the dependents of a shore worker, based upon a breach of the warranty of unseaworthiness.

This fallacy was referred to in a dissenting opinion of Circuit Judge Hastie, in *Skovgaard v. The M/V Tungus*, 252 F. 2d 14 (CA-3, 1957), which involved the same issue. Judge Hastie stated at page 20:

"Thus, to construe the New Jersey Statute as applicable to the present case, requires not only the inference that the New Jersey Statute was intended to create rights in accordance with Admiralty concepts of liability as they existed when the legislation was passed, but also that subsequent modifications of Admiralty concepts by the Federal Court routinely become a part of New Jersey policy and law."

(e) The Courts Have Not Interpreted The Various Lord Campbell's Acts As Encompassing Unseaworthiness.

A final and essential criterion in interpreting the State's statutes is the decisions of the New Jersey Courts which have considered the scope of the Act. Judge Hastie's dissent in *Skovgaard, supra*, gave great emphasis to the manner in which the New Jersey Courts had construed their own statute. His review of the precedents demonstrated that the New Jersey Court had consistently confined the application of the Act to negligence. He cited *Stewart v. Norton* (1951), 6 N. J. 591, 8 A. 2nd 111; and *DeCicco v. Marlou Holding Co.* (1948), 137 N. J. L. 186, 59 A. 2nd 227. Judge Hastie also referred to two New Jersey decisions relating to actions brought under the New Jersey Wrongful Death Act, as a result of fatal accidents occurring aboard ships. Both cases ruled that the liability of the shipowner depended upon proof of negligence. *Moran v. Moore McCormack Lines* (1944), 131 N. J. L. 332, 35 A. 2nd 415; and *Santa Maria v. Lamport & Holt Line, Ltd.* (E. & A. 1938), 119 N. J. L. 467, 196 Atl. 706.

Going beyond the New Jersey decisions, it is found that the precise point had been decided in cases arising under

the Lord Campbell's Acts of other States, all of which are similar in wording to the New Jersey Statute.

The question of whether a claim for unseaworthiness can be maintained under a State Death Statute was explicitly answered in the negative by the United States Court of Appeals for the Fifth Circuit in *Graham v. Lusi*, 206 F. 2d 223 (CA-5, 1953), where an action under the Florida Death Statute was considered. The decedent was a longshoreman whose fatal injury occurred as a result of a latent defect in ship's equipment. It was specifically stated at page 225:

"There is a complete absence of merit in appellant's attempt to avoid the foregoing defenses by invoking a right of action for unseaworthiness which, being a right of action the deceased might have maintained had he simply been injured and lived, is clearly not preserved by the legislative enactment under which appellant proceeds."

This rule was also followed by the Fifth Circuit in *Hartford Accident & Indemnity Company v. Gulf Refining Company*, 230 F. 2d 346 (CA-5, 1956), and in *Byrd v. The Napoleon Avenue Ferry Company, Inc.*, 125 F. Supp. 573 (E. D. La.), 227 F. 2d 958 (CA-5, 1955), cert. denied 351 U. S. 925.

The United States Court of Appeals for the Sixth Circuit made a similar finding in *Lee v. Pure Oil Company*, 218 F. 2d 711 (CA-6, 1955), which involved a death action brought pursuant to the Tennessee Wrongful Death Statute. After pointing out that the General Maritime Law gave no cause of action for wrongful death, and that any recovery must come from a State or Federal Statute, the Court stated at page 713:

"It is not contended that any Federal Statute conferred a substantive right of action for wrongful death in this case. The right was conferred by the Statute of Tennessee allowing recovery only in the event of the appellee's negligence."

Accordingly, this claimant should not have been permitted to maintain an action for unseaworthiness.

POINT III

The warranty of seaworthiness does not extend to Halecki.

(a) Only Those Doing Work Traditionally Performed By Seamen Are Protected By The Warranty Of Seaworthiness.

Also before the Court of Appeals for the Second Circuit in *Halecki* was the question as to whether the decedent, a shoreside electrician, was entitled to the warranty of seaworthiness owed to seamen. Stated differently, was Halecki the type of shoreside worker to whom the protection of seaworthiness was extended by the decision of this Court in *Seas Shipping Company v. Sieracki*, 328 U. S. 85 (1946)?

That decision was the first major extension of the warranty of seaworthiness which had previously applied only to seamen. It was held that longshoremen are entitled to the rights of seamen because they perform a sailor's work. The basis for expanding the doctrine of seaworthiness was the similarity between the work done by longshoremen and seamen, as indicated by the Court's statement at page 99:

" . . . Historically, the work of loading and unloading is the work of the ship's service, performed

until recent times by members of the crew. . . . For these purposes he (the stevedore) is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards."

The Court reasoned that a shipowner should not be allowed to avoid liability to those engaged in ship's service by arranging to have the work done by independent contractors.

Therefore, a review of the decisions following *Sieracki* is necessary to determine the meaning given to the expressions "seamen's work" and "ship's service", and to ascertain how far the warranty of seaworthiness is to be extended.

Sieracki was a longshoreman, and the cases which followed consistently held that loading and discharging cargo was "ship's work"; and those performing it were entitled to a seaworthy vessel. As stated in *Sieracki*, this task had been traditionally performed by seamen, and the men who did that work have been given the same protection.

Strika v. Netherlands Ministry of Traffic, 185 F. 2d 555 (CA-2, 1950), cert. denied 341 U. S. 904; *Lauro v. U. S.*, 162 F. 2d 32 (CA-2, 1947); *Mollica v. Compania Sud-Americana de Vapores*, 202 F. 2d 25 (CA-2, 1953), cert. denied 345 U. S. 965.

The application of the rule is less obvious in the cases of other harbor workers, such as ships' cleaners, repairmen and carpenters. However, the Courts have continued to examine the nature of the injured person's work, and its relation to the service of the ship. The determination for each case has not been based on the name of the party's trade, but upon the type of work he did.

A clear expression of this rule was made by the Trial Judge in *Berge v. National Bulk Carriers, Inc.*, 148 F. Supp. 608 (S. D. N. Y., 1957), aff'd 251 F. 2d 717 (CA-2, 1958). Referring to *Berge*, a shipyard rigger, Judge Murphy stated at page 610:

"The test then is not the name given to plaintiff's calling or trade, but the nature of his work, and viewed in this light it is abundantly clear that the plaintiff was not performing usual seaman's work

Since the whole rationale of *Sieracki* rests on the premise that a shipowner cannot escape its absolute obligation to provide a seaworthy vessel by contracting to have a third party perform the services traditionally performed by seamen, it becomes apparent that once the third party performs services different from those usually performed by seamen, the warranty of seaworthiness which was historically designed to protect seamen need no longer apply."

This criterion was affirmed by this Court in *Pope Talbot, Inc. v. Hawn*, 346 U. S. 406 (1953), which is often cited as an extension of the *Sieracki* doctrine. However, a review of the opinion indicated that it was consistent with the cases holding that a claimant's right to seaworthiness depends upon the similarity between his work and that done by seamen.

Hawn was a carpenter employed by an independent contractor, and at the time of his accident was working aboard a vessel which had been loading a cargo of grain. The loading operation had been temporarily interrupted because of a minor defect in the grain loading equipment, and Hawn was engaged in repairing this equipment so

that the loading could continue. It had been argued on behalf of the shipowner that Hawn was not a stevedore like Sieracki, and that the warranty of seaworthiness should not extend to him. However, Mr. Justice Black, writing for the majority of this Court, emphasized that Hawn's work involved preparing the ship for the carriage of cargo, and that his function was therefore similar to that of a stevedore. It was stated at page 413:

"Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or who were about to go on a voyage. All were subjected to the same danger. All were entitled to like treatment under law."

Hawn's work had been previously characterized by the Court of Appeals for the Third Circuit at 198 F. 2d 800, where it was stated:

"Hawn was . . . rendering service necessary in the performance of the ship's business of carrying cargo. The difference between Hawn and the long-shoreman in the Sieracki case is at most, one of slight degree." (Page 803)

Hawn's duties were further described by the opinion of the District Court which stated, 99 Fed. Supp. 226 at page 229:

“The doctrine of seaworthiness applied to plaintiff, whose duties had a direct relation to the proper loading and handling of the ship’s cargo in preparation for a voyage.”

The consideration given by each opinion to the relationship between Hawn’s work and the loading of cargo discloses the importance attributed to that connection.

The opinion of this Court expressly refrained from a general extension of the warranty of seaworthiness to cover all shoreside workers or repair men. The emphasis placed upon the similarity between Hawn’s work and that of Sieracki appears to indicate strongly an intention to include in the expressions “seaman’s work” and “ship’s service” only those tasks which are involved in some way in loading or preparing the vessel for the reception of cargo, or in the actual operation of the ship. In other words, the warranty applies only to those whose work is similar to that of seamen.

A review of lower Court decisions demonstrates that this distinction has been followed. In *Torres v. The Kastor*, 227 F. 2d 664 (CA-2, 1955), the warranty of seaworthiness was extended to a person known as a ship’s cleaner. At the time of his injury, Torres was engaged in cleaning the vessel’s cargo compartments in preparation for the loading of new cargo. Therefore, Torres’ work, like that of Hawn, was directly connected with the carriage of cargo, and was considered “seamen’s work”, within the meaning of *Sieracki*.

Liability for unseaworthiness was imposed in *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 784 (CA-3, 1953), which involved a ship’s cleaner who was injured while cleaning

the vessel's deep tanks. The Court pointed out that at the very time when Crawford was so employed, crew members were doing the same work, and that both should have the same protection.

On the other hand, the Courts have declined to extend the *Sieracki* doctrine to cover shoreside workers not performing "seamen's work", i.e., work related to the carriage of cargo. The claimant in *West v. United States*, 143 Fed. Supp. 473 (S. D. N. Y., 1956) was a marine engineer employed by a repair yard. It was held that the work performed by West was not of the type ordinarily performed by seamen and that the action did not therefore fall within the doctrine of the *Sieracki* and *Hawn* cases.

The Court of Appeals for the Third Circuit held that a rigger employed by a shipyard was not entitled to the protection of seaworthiness in *Meyers v. Pittsburg Steamship Company*, 165 F. 2d 642 (CA-3, 1948).

Reference to the relationship between the type of work and the loading of cargo was made in the Court's opinion in *Petersen v. United States*, 80 Fed. Supp. 84 (E. D. N. Y., 1947), which also involved a shipyard employee, injured aboard a vessel. It was stated at page 88:

"Since libellant was not a member of the crew, or a stevedore engaged in loading cargo, but an employee of a contractor repairman, he was not entitled to a seaworthy ship on which to work."

More recently, the Court of Appeals for the Ninth Circuit considered the question in *Berryhill v. Pacific Far East Line Inc.*, 238 F. 2d 385 (CA-9, 1957), cert. den. 1 L. Ed. 2d 1537, and refused to extend the warranty of seaworthiness to cover a shipyard employee injured while the vessel was undergoing repairs. Judge Barnes, expressing the

Unanimous opinion of the Court, reviewed the decisions of this Court in *Hawn, Petterson and Rodgers v. U. S. Lines*, 347 U. S. 984 (1954). It was pointed out that all of these claimants were injured while engaged in "ship's work", i.e., loading and unloading.

(b) Halecki Was Not Performing Work Traditionally Done By Seamen.

Judge Hand, who wrote the majority opinion in *Halecki*, agreed that the test to be observed was the nature of the work performed. He referred to *Guerrini v. U. S.*, 167 F. 2d 352 (CA-2, 1948), in which he, speaking for the Court of Appeals, had refused to apply the *Sieracki* doctrine to the libellant, who had been injured while cleaning boilers aboard a ship. However, Judge Hand found that his opinion was changed by the holding of this Court in *Pope & Talbot, Inc. v. Hawn, supra*, and further stated that he could not see a distinction between the work done by Halecki and Hawn (R. 150).

However, it is respectfully submitted that a comparison of the facts in each case demonstrates that Halecki's work was completely unlike that done by Hawn. As we have pointed out, this Court emphasized that Hawn's work in repairing loading equipment was like that of a stevedore, and was directly connected with the service of the ship.

However, it seems evident that Halecki was not performing work traditionally done by seamen. He was a trained and specialized worker, an electrician who ordinarily worked ashore. The very nature of the task of cleaning generators required that the ship be out of operation, and the vessel's power was in fact off when Halecki worked on the ship.

Halecki's job could not be performed while the ship's power was on, and it required special equipment, which was brought aboard by the decedent and his co-worker (R. 12) (R. 82). The work was so specialized that the repair yard engaged to overhaul the vessel was not itself equipped to perform it, and therefore the decedent's employer was engaged by the repair yard as an electrical subcontractor (R. 16).

Certainly the duties of Halecki had no relation to the loading and handling of cargo, nor was it work which had ever or could have been performed by seamen.

It is respectfully submitted that the majority opinion in *Halecki* misunderstood the nature of the work performed by Halecki, and that the warranty of seaworthiness was erroneously extended. The opinion characterized the decedent's work as "cleaning the ship", although the decedent was an electrician, employed by a subcontractor, and was engaged to perform specialized work aboard the ship while it was out of operation.

"The ship's cleaners" to whom the warranty was extended in other cases were men whose duties were, like that of Torres, to clean the ship in preparation for the reception of cargo.

The fallacy in characterizing Halecki as a ship's cleaner was emphasized by the dissenting opinion of Judge Lumbard, who contended that the warranty of seaworthiness should not be extended to workers such as Halecki. Judge Lumbard stated (R. 458):

"My brothers say that this work was merely cleaning a generator and, as cleaning propulsion machinery is a kind of work a seaman would normally

do, cleaning a generator is seamen's work and those who do it are entitled to a warranty of sea worthiness. This assimilates spraying with carbon tetrachloride to all cleaning as if it were harmless and common place; it is a play on words which by a characterization avoid dealing with a difference in means which completely destroys the validity of the syllogisms. Because seamen may be able to do some kind of cleaning does not make seamen of those who do another kind of cleaning which seamen have never done and cannot do; nor does it supply any reason why an outside specialist should be treated, or needs to be treated, like a seaman."

Judge Lumbard's dissent also referred to the interesting parallel between *Halecki* and *Berge v. National Bulk Carriers Corp.*, 251 F. 2d 717 (CA-2 1958). *Berge* was a rigger employed by a shipyard which was engaged in installing bulkheads aboard the defendant's vessel. Among the numerous points of similarity between *Berge* and the case at bar was the fact that both vessels were tied up at piers in repair yards. Moreover, officers of both vessels were aboard in a supervisory capacity, although the work in both instances was performed by the repair yards and their sub-contractors.

The Trial Judge found that the services performed by *Berge* were different from those usually done by seamen, and that consequently the warranty of seaworthiness did not apply. The appeal to the Court of Appeals for the Second Circuit was argued before the same panel which decided *Halecki*, and the *Berge* decision was handed down on the same day.

The Second Circuit, again speaking through Judge Hand, affirmed the dismissal of the complaint, and found

that Berge was not entitled to the protection of seaworthiness.

In commenting upon the inconsistency demonstrated by the different results reached by the same panel in the two cases, Judge Lumbard stated in his dissent (R. 159):

"What Halecki did was no more the kind of work that the crew of a vessel was accustomed to do than was what Berge was doing. Indeed, it was less so. One might characterize Berge's work as lowering a heavy load into the hold, a normal seamen's duty done without abnormal risk of harm. Halecki's work was entirely novel and foreign to what seamen had ever done and far more dangerous to anyone who might be aboard. As in Berge, the work required the cessation of ship's operations and the removal of the crew."

Commenting further upon the nature of Halecki's work, Judge Lumbard stated (R. 157):

"Halecki risked all the hazards of the sea as one might experience them on a Saturday in late September while the ship was made fast to a bulkhead in Jersey City. He was not a seaman, he was not doing what any crew-member had ever done on this ship or any where else in the world so far as we are informed. Whatever reasons there may be for extending the warranty of seaworthiness to stevedores or other harbor workers who work on board, they do not apply to those employed to do a special job of such a dangerous and unusual nature that it is beyond the competence of ship and shipyards, necessitates the removal and exclusion of the crew, and requires bringing extra equipment aboard for the same performance of the hazardous activities."

Further support for the contention that Halecki was not doing seamen's work is found by a comparison with *Berryhill v. Pacific Far East Lines, Inc.*, 238 F. 2d 385 (CA-9, 1957), cert. den. 1 L. Ed. 2d 1537, in which the Ninth Circuit had found that the plaintiff was not doing work which entitled him to the warranty of seaworthiness. The Court pointed out that Berryhill, a repairman, was working on the ship's propeller shaft, and that the vessel's propulsion machinery was necessarily out of operation.

The circumstances in the instant case were similar to those in *Berryhill*, for in both instances, the work could only be performed when the ship's power was off and the vessel was out of operation. Neither job could be done by seamen.

(c) A Shipowner Does Not Warrant The Seaworthiness Of Equipment Not Connected With The Operation Of The Ship.

The *Halecki* opinion also referred to *Pettersen v. Alaska S.S. Co.*, 205 F. 2d 478 (CA-9, 1953), as authority for imposing liability for unseaworthiness in the instant case. In *Pettersen*, this Court affirmed the opinion of Chief Judge Denman of the Ninth Circuit, who held that the ship was liable for a defect in a block, which had been brought aboard ship by the stevedoring company for use in loading the vessel.

The limitations of the *Pettersen* decision were pointed out by Judge Barnes of the Ninth Circuit in *Berryhill v. Pacific Far East Line, supra*. There the defective equipment was a grinding wheel furnished by the shipyard. Judge Barnes declined to impose liability and pointed

out that the equipment considered in *Pettersen* was a snatch block, used in loading. He stated at page 387:

"This equipment took the place of equipment usually furnished and necessarily required by the ship. It was ship's equipment necessary to enable the crew to perform "ship's work", i.e., loading and unloading. . . . Appellant asks us to step one further pace toward an absolute liability of the owner of a vessel for defects existing in equipment that the ship could do without, that the owner may never have bought or even see, or have had any reason to know it existed."

A review of the facts in *Haldecki* demonstrates that the *Berryhill* principle and not that of *Pettersen* should be applied here. Liability has been imposed because of the alleged inadequacy of the ventilation equipment in use aboard the vessel. This equipment consisted of portable blowers, fans, air hoses, gasmasks and tanks of carbon tetrachloride, all of which were brought aboard the vessel by the decedent and his co-worker. None of this equipment, except the vessel's own ventilators, was owned or supplied by the vessel, and none of it was connected in any way to the operation of the vessel.

It does not seem that the *Pettersen* doctrine was intended to hold a shipowner liable for the inadequacies of specialized equipment brought aboard by subcontractors, for use in an operation which could only be conducted while the ship's power was off, and which was not connected in any way to the service of the vessel.

POINT IV

Respondent failed to establish the existence of a defective condition.

Regardless of the various legal issues heretofore discussed in this brief, petitioner contends that upon the trial there was a complete failure of proof of the existence of either negligence or unseaworthiness, and that the case should not have been submitted to the jury. Although the sufficiency of evidence is not ordinarily a matter which this Court wishes to review, it is felt that the absence of valid testimony on this point is so complete that a reversal and dismissal is justified, even at this time.

The petitioner does not maintain that the mere necessity of speculation on the part of the jury indicates that the evidence is insufficient. This principle was demonstrated by the decision of this Court in *Schulz v. Pennsylvania Railroad Company*, 350 U. S. 523 (1956). However, a comparison of the facts indicates that the authority of *Schulz* has no application to the *Halecki* case.

Schulz met his death by drowning. Although there were no witnesses, the record contained evidence of several negligent or dangerous conditions which could have caused the decedent's death. This Court held that the jury should have been permitted to decide which of several possible causes had brought about the accident.

However, the *Halecki* record did not contain proof of the existence of any dangerous condition, and the jury was first allowed to speculate upon the existence of a defect aboard the petitioner's vessel, and then to further sur-

mise that this supposed condition caused the decedent's death.

The issue in *Halecki* was the adequacy and condition of a ventilation system, as it existed aboard the vessel on the day when the decedent worked there. The sole factual witness on behalf of the claimant was Donald Doidge, who was the decedent's co-worker. Doidge, who had previously given a deposition for the defendant, testified that the portable ventilators and other equipment were assembled properly, that the ship's ventilation system, which was powered from shore, was operating efficiently, and that he was satisfied that the ventilation was adequate for the job (R. 11-15).

In addition to the testimony of Mr. Doidge, the claimant relied upon Robert P. Gaines, a bio-chemist, who appeared as an expert witness (R. 18).

Although Doctor Gaines had never been aboard the vessel in question (R. 28), he was permitted to answer hypothetical questions based upon the general description of the engine room contained in witness Doidge's testimony. Over the objection of defendant's counsel, Doctor Gaines stated that there was a dangerous concentration of carbon tetrachloride present in the engine room, and moreover that the ventilation system was inadequate (R. 22-24).

However, upon cross examination, Doctor Gaines admitted that his calculation did not take into consideration essential factors such as the power and location of the portable blowers, the arrangement and pressure of the air hoses, the power and blade size of the fans, and the power and construction of the ship's ventilation system.

(R. 28-31). Most significantly, Doctor Gaines specifically admitted upon cross examination that he did not know whether the ventilation system aboard the ship was adequate (R. 32).

The defendant had introduced testimony that Halecki's death from carbon tetrachloride poisoning was due to his susceptibility to even a slight exposure far below the generally accepted safe margin. This testimony, given by Doctor Milton Halpern, the New York State Medical Examiner, established that a person who habitually drinks to excess could be fatally injured by a slight and ordinarily harmless exposure (R. 37-38). The record also showed that the decedent drank excessively (R. 18).

It is apparent that the appellee's claim and the jury verdict were based upon inverse reasoning. The evidence disclosed that the decedent died of carbon tetrachloride poisoning, and the jury was permitted to speculate that the death was caused by a defective condition aboard the vessel, although the record contained no evidence that such a defect existed.

Although *Schulz* and other cases have demonstrated that a jury should be permitted to decide which of several possible inferences is the most reasonable, it has always been held that there must be some evidence upon which to base the inference. In a decision of this Court, made in *Lavender v. Kurn*, 327 U. S. 645 (1946), it was stated at page 653:

"Whatever facts are in dispute or the evidence is such that fairminded men may draw different inferences a measure of speculation and conjecture is required on the part of those whose duty it is to

settle the dispute by choosing what seems to them to be the most reasonable inference. Only when there is a complete absence of probative facts to support the conclusion reached does a reversible error appear."

It is a basic rule of evidence that a hypothetical question must be based upon facts which are in evidence. Petitioner contends that Doctor Gaines' testimony should have been excluded, because of his admission that he could not answer without facts which were not within his knowledge, and upon which no testimony had been received. In *Virginia Beach Bus Line v. Campbell*, 73 F. 2d 97 (CA-4, 1934), the rule was stated as follows at page 99:

"It would be reversible error to permit the answer of an expert witness to a hypothetical question which assumes the existence of facts upon which no evidence is offered."

A succinct expression of a plaintiff's burden to establish affirmative evidence was made by this Court in *Moore v. Chesapeake and Ohio Railroad Company*, 340 U. S. 573 (1951), where it was stated at page 578:

"Speculation cannot supply the place of proof."

The majority opinion in *Halecki* disposed of that portion of the appeal which was based on insufficiency by stating that the competence of the plaintiff's expert witness was within the discretion of a trial court. The cases cited for this holding involved instances where the qualifications of the experts had been questioned (R. 149).

The petitioner respectfully submits that the majority misinterpreted this phase of the appeal, as the qualifications or the competency of the expert witness was not questioned. The appellant contended that the record did not contain evidence sufficient to form a basis for the expert's opinion, and that this insufficiency was admitted by the witness himself. Accordingly, it is the position of the petitioner that the evidence not only failed to establish a causal connection between the decedent's death and a defective condition aboard the vessel, but also did not establish that any defective condition in fact existed. Therefore, the action should have been dismissed.

CONCLUSION

For the reasons stated it is respectfully submitted that the judgment of the Court below should be reversed, and that the action should be dismissed. In the alternative the case should be remanded to the District Court for a new trial.

Respectfully submitted,

LAWRENCE J. MAHONEY

Counsel for Petitioners

67 Wall Street

New York 5, New York

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OCT 18 1958

JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

October Term, 1958

No. 56

**UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION, a corporation and UNITED NEW YORK SANDY
HOOK PILOTS ASSOCIATION, a corporation,**

Petitioners,

—against—

**ANNA HALECKI, Administratrix ad Prosequendum of the
Estate of Walter Joseph Halecki, deceased, and ANNA
HALECKI, Administratrix of the Estate of Walter Joseph
Halecki, deceased,**

Respondent.

PETITIONERS' REPLY BRIEF

LAWRENCE J. MAHONEY

Counsel for Petitioners

67 Wall Street

New York 5, New York.

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IN THE

Supreme Court of the United States

October Term, 1958

No. 56

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION, a corporation and UNITED NEW YORK SANDY
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Petitioners,

—against—

ANNA HALECKI, Administratrix ad Prosequendum of the
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HALECKI, Administratrix of the Estate of Walter Joseph
Halecki, deceased,

Respondent.

PETITIONERS' REPLY BRIEF

POINT I

The New Jersey Wrongful Death Act does not preserve the decedent's rights, but creates new rights for the benefit of his dependents.

The respondent's counsel has argued that the "such as would" language in the New Jersey Wrongful Death Act, N.J.S.A. 2A 31-1 through 6, gives to the decedent's dependents the same rights he would have had if he had

lived. It is specifically contended that Halecki, if injured under the same circumstances, would have had a right to sue for unseaworthiness, and that his action would have been measured by the Maritime rule of comparative negligence. The respondent maintains that the New Jersey Wrongful Death Act passes the same rights on to the administratrix.

Counsel for the respondent thereby attributes the characteristics of a Survival Statute to a Wrongful Death Act. Survival Statutes, including that of New Jersey, Revised Statutes of New Jersey 2A:15-2; N.J.S.A. 2A:15-3, preserved to a decedent's estate the rights which the fatally injured person had prior to his death. These rights, which would otherwise die with him, are composed of the injured person's own damages, such as pain and suffering, lost wages and medical expenses.

Curtis v. Garcia, 241 F. 2d 30 (CA-3, 1957).

An entirely different set of damages are recoverable under a Wrongful Death Act, which creates new rights for the benefit of the decedent's beneficiaries. A party suing under a Wrongful Death Act sues to recover for his own damages, i.e. loss of anticipated support caused by the injured person's death.

If this respondent had intended to rely upon the rights which Mr. Halecki himself would have had, the action should have been based upon the New Jersey Survival Statute. However, the suit relied solely upon the Wrongful Death Act, which must be the only source of the respondent's rights.

POINT II

Halecki was not performing seaman's work.

In contending that the decedent was doing the type of work which entitled him to the warranty of seaworthiness, counsel for the respondent placed great reliance upon the fact that members of the petitioner's crew had been working aboard the vessel during the week previous to the time when the decedent cleaned the generators. In support of the contention that this fact established that Halecki was doing seamen's work, the respondent referred (page 19) to *Crawford v. Pope & Talbot*, 206 F. 2d 784 (CA-3, 1953). There, the plaintiff had been injured while cleaning deep tanks, and the Court pointed out that members of the crew were at the same time engaged in the same work.

However, the crewmen of the pilot boat "NEW JERSEY" had performed only painting, chipping and other typical seamen's work, none of which was in any way related to the specialized task performed by the decedent. None of the men were working at the same time, and none were qualified to do the type of work done by Halecki.

It is also argued that Halecki was entitled to the warranty of seaworthiness, because the type of work he was doing can be and is performed by electricians employed in a ship's crew.

However, the work done by Halecki in cleaning the vessel's generators was clearly not the type of maintenance work performed by a seagoing electrician while a ship is underway. Electricians employed as members of the crew are primarily concerned with keeping the vessel in operation

and their duties, training, and experience are clearly not similar to those of Halecki.

In this instance, the work could only be done while the vessel was out of operation and was of such a specialized nature that even the repair yard was required to engage the service of a subcontractor. Moreover, the equipment used was completely unlike that carried aboard the ship, and had to be supplied by the decedent's employer and by the repair yard.

POINT III

The Third Circuit, which had decided *Skovgaard*, applied contributory negligence to an action under a State Wrongful Death Act.

In the petitioner's brief, reference was made to the decision of *Hill v. Waterman*, 251 F. 2d 655 (CA-3, 1958), in which the Third Circuit held that contributory negligence should be applied as a complete defense to an action brought under the Pennsylvania Wrongful Death Act. The respondent has pointed out that the summary of the petitioner's argument incorrectly stated that the Hill decision had considered the New Jersey Wrongful Death Act.

However, this inadvertence does not alter the significance of the Third Circuit's position in *Hill*. It was the Third Circuit's holding in *Skovgaard v. MV "Tungus"*, 252 F. 2d 14 (CA-3, 1957), which supplied the basis for the Second Circuit decision in *Halecki*. However, in *Hill v. Waterman*, which was decided subsequent to both *Skovgaard* and *Halecki*, the same Court applied the doctrine of contribu-

tory negligence, which had been rejected by the Second Circuit's holding in Halecki.

Dated: New York, New York
October 16, 1958

Respectfully submitted,

LAWRENCE J. MAHONEY

Counsel for Petitioners

67 Wall Street

New York 5, New York

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FILED

MAY 28 1958

JOHN T. FEY, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. **56**

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION, a corporation and UNITED NEW YORK SANDY
HOOK PILOTS ASSOCIATION, a corporation,

Petitioners,

—against—

ANNA HALECKI, Administratrix ad Prosequendum of the
Estate of Walter Joseph Halecki, deceased, and ANNA
HALECKI, Administratrix of the Estate of Walter Joseph
Halecki, deceased,

Libellant-Respondent.

**BRIEF OF LIBELLANT-RESPONDENT IN
OPPOSITION FOR PETITION FOR
WRIT OF CERTIORARI**

NATHAN BAKER

Counsel for Respondent

1 Newark Street

Hoboken, New Jersey

BERNARD CHAZEN

MILTON GARBER

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1957

No. 955

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION, a corporation and UNITED NEW YORK SANDY
HOOK PILOTS ASSOCIATION, a corporation,
Petitioners,
—against—

ANNA HALECKI, Administratrix ad Prosequendum of the
Estate of Walter Joseph Halecki, deceased, and ANNA
HALECKI, Administratrix of the Estate of Walter Joseph
Halecki, deceased,

Libellant-Respondent.

**BRIEF OF LIBELLANT-RESPONDENT IN
OPPOSITION FOR PETITION FOR
WRIT OF CERTIORARI**

Counter-Statement of Questions Presented

Whether a state may, in enacting a remedial statute permitting recovery for wrongful death, incorporate by reference the standard of liability under maritime law which existed for the benefit of the deceased if he had lived, where such deceased was injured and died on the navigable waters of the United States and within the geographic jurisdiction of a state?

Whether a shipowner is under a duty to provide a seaworthy vessel to an electrician who comes on board a vessel



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to clean some electrical equipment during its annual overhaul, which consisted of painting; making minor repairs, changing lines, working on the engine room, etc.; part of which overhaul is done by the ship's crew at the same time while the ship is afloat in navigable waters?

Statement of Facts

This petition involves an affirmance of an appeal from a judgment rendered in favor of plaintiff following a jury verdict for \$65,000.00. The plaintiff sued on behalf of the next of kin of a deceased employee of an independent contractor who died as a result of carbon tetrachloride inhalation on defendant's vessel. Plaintiff bases her action on negligence and unseaworthiness.

On or about September 24, 1951 the defendant contracted with Rodermond Industries, Inc. of Jersey City, New Jersey to have certain work done on the Pilot Boat "New Jersey" (P89a) [all references in the Statement of Facts, are to the appendix in the Court of Appeals].

The list of items for work to be done was admitted in evidence as Exhibit 5 and also Exhibit 6 (P6a; P11a). It provided in part (P89a):

"Crew to remove and replace the 8 cylinder heads for the port and stbd generators.

Contractor to remove the eight (8) heads to the ship, disassemble same, grind in the valves, thoroughly clean out the head, reassemble and return to vessel. Stone commutators to remove high spots and ridges and cut clean to mica all segment bars. Clean and adjust brush riggings and brushes.

Spray clean with carbon tetrachloride the armature and field windings to remove all traces of dirt and film. Close up and prove in good order. (Italics ours.)

Mr. Doidge the foreman for the employer of the deceased, testified that with reference to the above quoted item he had consulted with the chief engineer on the boat (P7a). They agreed that the carbon tetrachloride work which had been specified in the contract would be done on Saturday, September 29, 1951 (P8a). He also testified (P8a):

"Q. Did you discuss the danger of the use of this carbon tetrachloride with the chief engineer at that time? A. I don't think so. We just take those things for granted. We knew what it was all about.

The Court: That is the reason you discussed fixing a particular time when to do the work?

The Witness: That is right, your Honor."

The captain of the defendant's vessel was in court but he was not called upon to testify (P79a). The plaintiff had read parts of the testimony on deposition that Captain Haley had given during the presentation of the plaintiff's case (P61a). He had testified that he was the captain of the New Jersey on September 29, 1951 (P61a). On that date the vessel was located at Rodermond Industries in Jersey City for "the annual overhaul" (P62a). Captain Haley testified among other things (P63a):

"Q. When you brought it there, was it brought by you and the officers and your complete crew? A. That is correct, sir, and the Marine Superintendent was aboard, too..

Q. When you say the marine superintendent, the marine superintendent of what company? A. Of our organization."

.

"Q. What took place when you first brought the vessel into Rodermond Industries pier in Jersey City?

A. Well, as far as I can recollect, we went up to see the yard superintendent and also the different—what do they call them, various superintendents and snappers or bosses like they say in the shipyard. We discussed what we were going to do with the vessel.”

.

“Q. Just tell me what you did in reference to the vessel. A. We were moored in Rodermond Industries, and I was on board every day during the working hours.”

.

“Q. And what were the work hours? A. From 7.30 until anywhere up to 5, 6 or 7 o'clock at night.

Q. And that was every day while it was at the Rodermond Industries pier? A. With the exception of week-ends, naturally.

Q. During the period of time that you were aboard the vessel while it was at Rodermond Industries pier, during the working hours that you have described, what were your duties aboard the vessel or what did you do aboard the vessel? A. Usually when you go into a yard like this you have a certain amount of deck work to do, like painting, and fixing up minor repairs, a general overhaul of the deck department, renew lines and take care of the general appearance of the vessel, the bridge, the galley, the mess-hall, your rooms, you paint them, and so forth.”

Q. Who would do that? A. That would be the deck department.

Q. You mean the deck department of the vessel? A. Of the vessel.

Q. That has nothing to do with Rodermond Industries? A. No, sir.”

.

Q. During that period of time when it was in the Rodermond Industries yard, during that period around September 29, 1951, could you tell us what the skeleton officers and crew consisted of that remained aboard the vessel to the best of your recollection? A. To my best recollection I had myself, who, as I recall, was the only officer in the deck department, and then I had approximately four or five deck men.

Q. And the engine department? A. We do not have anything to do as far as the engine goes. Do you want me to elaborate?

Q. I will also ask you to go into the engine department, officers and crew of the engine department. A. We had the full complement of engineers and engine room crew aboard.

Q. During that period of time? A. That is correct.

Q. What were the engineers and the engine room crew doing in general aboard the vessel while it was in Rodermond Industries during that period of time? A. They were maintaining the engines and any other specific work that we had to take care of.

Q. Were they also present during the night hours, the engine department? A. In some cases you would have men sleeping aboard the vessel at night.

Q. During that period of time while the vessel was at Rodermond Industries shipyard did the engine department have an officer and crew during the night hours? A. As a standby or as a watch? What do you mean by that?

Q. Anyway at all. A. Well, at night, yes, I will say that there was somebody that represented the engine department aboard the vessel on most of the occasions."

He testified (P67a):

"Q. What was your job or what were your duties during that period of time when the Rodermond Industries were doing some repair work, what did you have to do with reference to the vessel while that repairs work was going on? A. Well, the repair work was represented by the marine superintendent who during the working hours inspected and went around the vessel to see that the different jobs were being done, and discussing the jobs with the snappers, and taking a general interest in that particular work that was being done by Rodermond Industries."

He testified (P69a):

"Q. Then during this entire time while Rodermond Industries were doing their work, their repair work, you have your own deck crew on the vessel doing certain maintenance work and painting work and so forth on board the vessel? A. That is true, yes, sir.

Q. Did your deck crew do that work only the five working days of the week, or did they do such work on Saturdays and Sundays, if you recall? A. If it was necessary they would work on a Saturday or a Sunday.

Q. Did your deck crew work on September 29, 1951, which was a Saturday? A. I had one man there.

Q. Who did you have there? A. Walter Thompson.

Q. What was his position? A. He was to maintain a watch."

He testified (P70a):

"Q. And the inspection of the vessel while it was at Rodermond Industries would also be under your jurisdiction? A. Mine and the marine superintendent.

Q. And if either you or the marine superintendent discovered any unsafe conditions aboard the vessel it would be up to you or him to see that they were corrected? A. Well, naturally."

On cross-examination by his own attorney, he stated (P72a):

"Q. Captain, can you tell me the purpose for which the ship was put into Rodermond Industries? A. For the annual overhaul.

Q. Just briefly what did that consist of? A. That consisted of deck and engine work.

Q. Repairs and overhaul? A. Repair and overhauls, yes.

Q. Was that work done under your orders? A. No, sir.

Q. To your knowledge was it done under any orders of any of the members of the Pilot Association? A. Under the orders of the marine superintendent.

Q. When you say under the orders of the marine superintendent, you mean in accordance with the specifications? A. That is correct."

Not only did the defendant fail to call the Captain of the vessel as a witness, but it failed to call the Chief Engineer of the vessel either although he was still employed by them (P80a). Nor did the defendant call its Marine Superintendent to testify although he was still employed by them (P81a). In fact it didn't call any witness except Walter C. Thompson, the man who was on watch and its medical and engineering experts who did not have direct knowledge of the situation.

The deceased was 40 years old at the time of his death (P1a). He had a wife and three infant children (P1a). He was an electrician employed by the K & S Electrical

Company (P2a). In September of 1951 he worked under Donald Doidge who was a foreman (P5a). The deceased and Doidge brought a blower belonging to Rodermond Industries on board the vessel on Friday for use on Saturday (P15a). It was placed in position about 7 or 8 feet above the engine room floor and tied to a rail (P16a). The Chief Engineer of the vessel had been present on Friday when Doidge made preparations and put the blower in position (P10a; P16a).

On Friday Doidge had sprained his wrist (P29a). Consequently on Saturday he found that he couldn't hold a spray gun and press the trigger on it because of the condition of his wrist. The deceased took over the spraying and Doidge just helped him "move the stuff around" (P29a). Doidge did spray for two or three minutes before he gave up (P29a). Doidge went down into the engine room while the deceased sprayed but later on he didn't go down every time with the deceased (P37a). The deceased would spray for 15 or 20 minutes and would come out of the engine room. Then he'd repeat the procedure (P30a). Mr. Doidge testified (P30a):

"Q. During the time that he was spraying in the engine room, you stayed on top of the deck? A. At first I stayed down—the first two or three times down there I stayed down with him altogether. Then, as the can got higher he could move it a little himself and then I wouldn't go down quite as much. I would just look in from the top of the engine room."

Mr. Doidge and the deceased started to work about 8:30 a.m. on Saturday morning (P28a). They started spraying about 8:45 or 9:00 a.m. (P28a). They stopped for lunch at noon for about half an hour and then they resumed work until about 3:00 or 3:30 p.m. (P30a). They

both left the vessel. The deceased complained of a "peculiar taste in his mouth" (P31a). The defendant's crew member who had been on watch testified that "at the end of the day one of the fellows just said he wasn't feeling well" (P78a). Mr. Doidge testified that the deceased had been a sober man on the job (P31a).

Both Doidge and the deceased used three gas masks supplied by K & S Electric Co. (P27a). They were regular Army surplus gas masks (P27a). Doidge checked the gas masks before they used them (P36a). He stated that whenever he saw the deceased working below he wore a mask (P38a). Mr. Doidge also testified on cross-examination that the gas masks were not defective because the Police Department had checked the masks after the accident and he received a report from them (P42a; P43a).

The cause of death of the deceased was admitted. During the cross-examination of defendant's medical expert, the trial court asked (P84a):

"The Court: The autopsy diagnosis was death from carbon tetrachloride poisoning. You are in agreement with that?"

The Witness: Yes, sir.

The Court: I think everybody is in agreement on that. Is there any question about that?

Mr. Mahoney: The defendant does not take issue with that, your Honor."

The great danger involved in the use of carbon tetrachloride in a confined place without proper ventilation was not disputed. (P8a; P34a; P41a; P45a; P50a; P82a; P86a).

Dr. Robert P. Gaines was called upon to testify for plaintiff. He had a Ph.D. in chemistry and was a biochemist with specialty in toxicology and public safety.

(P46a). He testified that carbon tetrachloride is a member of the methane series in organic chemistry; that it had a specific gravity of 1.54 which means it is heavier than water; that it had a boiling point of 77 degrees Centigrade which meant that it was "rather volatile" (P46a). Carbon tetrachloride is about 5 times heavier than air (P53a).

He stated that at one time it was used as a medicine to eliminate worms but this was discontinued when it was discovered that this was a "toxic substance." It then became popular in connection with fire extinguishers because it was a non-conductor of electricity and could be used where electrical devices were involved. However it was found that these fire-extinguishers when used in confined places caused poisonings and warning labels were subsequently affixed to them (P47a). It was discovered that carbon tetrachloride was an ideal, economical, and efficient solvent where grease was involved and it came into more general use. Then it was discovered that employees in industries where the chemical was in wide use began to develop complaints. Studies were then made by public health authorities about 20 years ago and it was found that the chemical could be used if "adequate ventilation was provided" (P48a). A concentration of 50 to 100 parts per million of carbon tetrachloride was considered safe (P49a). Dr. Gaines also developed in his testimony the toxicological process by which the chemical affected the human body (P49a). He testified that exposure or inhalation of carbon tetrachloride in an amount beyond the safe concentration would be "obviously harmful and deleterious" (P50a). The concentration stated by the expert represents weight per unit volume and reflects the concentration of strength (P51a; P52a).

Dr. Gaines testified that in view of the fact that carbon tetrachloride is about five times heavier than air it would

sink to the bottom of the engine room and have the greatest concentration there (P53a). The blowers would merely act to agitate or stir up the air in the engine room rather than replace it or remove it (P53a). Proper ventilation would require ventilating ducts *at floor level* (P56a).

Doidge testified that the engine room was approximately 40 feet long, 30 feet wide and about 18 feet high (D5a). He stated that they had used 8 gallons of carbon tetrachloride (D6a). Dr. Gaines computed on the basis of these dimensions and without considering the displacement by machinery in the room that this involved 21,600 cubic feet of air (D22a). He testified that temperature variations except where the freezing point is reached would make very little difference in volatilization (D23a). Taking a temperature of 25 degrees Centigrade as an average temperature, Dr. Gaines concluded that in a space 40 by 30 by 18 feet, eight gallons of carbon tetrachloride sprayed in six hours would produce a concentration of 20,000 parts per million (D23a). There was machinery in this room (P82a; P83a). This, as a matter of physical fact, would increase the concentration and the danger. This would produce at least 200 times the allowable safe concentration (D24a). Dr. Gaines testified (D32a):

"The Court: The actual concentration in the area, of course, would depend upon the effectiveness of the ventilating units; is that correct?

The Witness: And the amount of material present.

The Court: When you say the amount of material present, I don't follow that.

The Witness: That is, whether they used a pint bottle or a gallon bottle, or five gallons.

The Court: Well, to put it more specifically, I thought my question was clear, you gave a figure of 20,000 parts per million. Is it correct to suggest that

that is the maximum which does not take into account any of the ventilating items contained in that?

The Witness: Yes.

The Court: Because in reaching that figure you excluded all ventilating factors.

The Witness: Yes, I used that in a confined area.

The Court: And accordingly the actual concentration per million in that engine room would depend upon the effectiveness of the ventilating units?

The Witness: Yes, and we believe that we used those measurements without allowing for displacement by equipment."

However he also testified (P59a):

"Q. The Court will ask a question at this time. Of course, your answers were based upon the hypothetical information given to you when Mr. Baker questioned you. He described these various items of ventilation.

A. Yes, sir.

Q. And I take it to that extent, at least, your answer was based upon a hypothetical state of facts? A. Limited within that, yes.

Q. Counsel just asked you whether or not you knew that these various items were functioning properly and you said you didn't know? A. Of course not.

Q. I say to you now that the evidence in the case is that all these items were operating properly and functioning properly on the day in question. That is the testimony of Mr. Doidge. Would that make any difference in your answer as to the extent of concentration on that day in that area? I want to assure both counsel it is their duty to object to the question if it should be objected to.

Mr. Mahoney: No objection. I understand that is the evidence.

A: If his Honor pleases, I recall two doors being on the side at about eight feet above floor level. *That door would be the only factor in the testimony or in the items introduced as being somewhat efficacious in removing the vapors, because that was low down, near to the floor.*

The circulating fan would have no bearing on the removal of the vapors. It would merely act as a circulating agent. The air hose, which was supplied near the operator's face, would have no effect at all on the diminution or the increasing of the concentration. I recall now an exhaust pipe sucking air out of this room, and I believe that would have—and I do say that—without any hesitation I say that that would be instrumental in diminishing the concentration in the room, but as to how much I cannot say.

I recall a hose near the ceiling as coming in with fresh air. That, sir, would be very little because it would be merely blowing in fresh air which would be increasing the concentration at the lower level.

Then the two skylights that are open again would have no effect on ventilation, but it would have on dilution because we must bear in mind, sir, that this vapor is more than five times heavier than air, 5.3 or .4. I said three times heavier before, and I meant five.

Therefore your concentration would be increased near the floor level and gradually increased as it goes up. I would say that all the items that were enumerated by both attorneys would have some effect, especially the doors and your exhaust. The others would have a negligible effect. *Do I answer the question, sir?* (Italics ours.)

The defendant's expert engineer on cross-examination confirmed Dr. Gaines's opinion (P86a):

"Q. In your opinion, was that system adequate to remove carbon tetrachloride from the engine room?

A. In my opinion it was not.

Q. And why do you say that, Mr. Finkenauf? A. I don't see how you could expect any ship's ventilating system to take care of those noxious gases that are introduced, and particularly those that are heavier than air and lie down near the bilges. You would have to have a special blowing device to stir that air up and permit it to circulate out with the rest of the exhausted air."

The jury returned a verdict for \$62,500 for the pecuniary loss to the widow and dependent children and for \$2500 for conscious pain and suffering of the decedent (P69a). Defendant moved to set aside the verdict, for judgment notwithstanding the verdict and for a new trial. All motions were denied.

The judgment was affirmed in the Court of Appeals. Judge Learned Hand wrote the majority opinion. Judge Hincks agreed with Judge Hand, while Judge Lumbard dissented.

POINT I

Two Courts of Appeal have interpreted the New Jersey Wrongful Death Act to apply the standards of maritime law in accidents which occurred on the navigable waters within the geographic jurisdiction of the State of New Jersey and there are no conflicting decisions on this interpretation of New Jersey law.

Two Courts of Appeal, in the Second Circuit and the Third Circuit respectively, which handle a large volume of maritime cases, after lengthy and thoughtful argument and consideration have agreed that the New Jersey Wrongful Death Act permits an action based on unseaworthiness and applies maritime principles of tort liability where the deceased, if he had lived, would have had a right to recovery on such principles of liability. *Skovgaard v. The M/V Tungus*, 252 F. 2d 14 (3 Cir. 1957); *Halecki v. United New York and New Jersey S. H. P. Ass'n*, 251 F. 2d 708 (2 Cir. 1958). This court in *Kernan v. American Dredging Co.*, 355 U. S. 424, 78 S. Ct. 394, L. Ed. (1958) in footnote 4 of Mr. Justice Brennan's opinion referred to the opinion of the Court of Appeals in the *Skovgaard* case with apparent approval indicating in said footnote that the reasoning of the court in the *Skovgaard* case was consistent with the decisions of this court in determining the remedy available for death occurring on navigable waters. In addition, the decision of the Court of Appeals in this case written by Judge Learned Hand is consistent with and logically follows the decisions of this court in *Pope & Talbot v. Hawk*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953); *Levinson v. Deupree*, 345 U. S. 648, 73 S. Ct. 914, 97 L. Ed. 1319 (1953); *Just v. Chambers*, 312 U. S. 668, 61 S. Ct. 687, 85 L. Ed. 903 (1941); *Western Fuel Co. v. Garcia*, 257 U. S. 233, 42 S. Ct. 89, 66 L. Ed. 210 (1921); *Old Dominion S.S. Co. v. Gilmore*, 207

U. S. 398, 28 S. Ct. 133, 52 S. Ct. 264 (1907). Pursuant to these decisions it is clear that although maritime law does not give the next of kin of a deceased a right to recover under the maritime law itself, the maritime law will adopt and enforce a state wrongful death act to supplement the general maritime law.

The petitioners do not quarrel apparently with the construction of the New Jersey Wrongful Death Act which would permit recovery for negligence. This has been established for several years. *Gill v. United States*, 184 F. 2d 49 (2 Cir. 1950); *The H. S. Inc. No. 72*, 130 F. 2d 341 (3 Cir. 1942). On the other hand the plaintiff does not claim that the maritime law, by itself, gives a remedy to the next of kin for wrongful death. The issue in this case is not whether the maritime law permits recovery for wrongful death but whether the New Jersey Wrongful Death Act when adopted and enforced as part of maritime law will use the same test of liability as the deceased would have had if he had lived. The issue, as framed and decided by the majority in the Court of Appeals, involved a construction of a state wrongful death act rather than any alteration or departure from existing decisions of this court.

The defendants allege that the decision of the Court of Appeals interpreting the New Jersey Wrongful Death Act is in conflict with the decisions of other federal courts. None of the decisions referred to in the petition involve the New Jersey Wrongful Death Act. It is possible that the Wrongful Death Acts of other states may receive a much more narrow interpretation than the one involved in this case because of state court decisions narrowly construing such acts or because of differences in the wording of the statutes.

In the Pennsylvania statute, 12 Purdon, Penna. Statutes Anno. §1601, the test of liability is merely set forth as "unlawful violence or negligence" rather than "wrongful act, neglect or default" as set forth in the New Jersey statute. Furthermore, the Pennsylvania does not employ the "such as" test of the New Jersey statute which incorporates the test of liability based on the rights of the deceased if he had lived.

Under such circumstances the Court of Appeals for the Third Circuit may consistently reach one result under the New Jersey Act, *Skovgaard v. M/V Tungus*, 252 F. 2d 14 (3 Cir. 1957) and a different result under the Pennsylvania statute. *Hill v. Waterman*, 251 F. 2d 655 (3 Cir. 1958); *Curtis v. Garcia*, 241 F. 2d 30 (3 Cir. 1957).

POINT II

The interpretation by the Court of Appeals of the New Jersey Wrongful Death Act is fully consistent with the plain language of the statute and the New Jersey decisions interpreting the statute.

The construction of the Court of Appeals in holding that the New Jersey Wrongful Death Act incorporated the same test of liability as would be applied if the deceased had lived was consistent with the plain language of the Statute and with the decisions of the New Jersey courts.

N. J. S. A. 2A:31-1 provides in part:

"When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages, . . ." (Italics ours.)

The courts of New Jersey have consistently held that the test of liability under the New Jersey Wrongful Death Act is the test of liability which would apply if the deceased had lived. In *Consolidated Traction Co. v. Home*, 59 N. J. L. 275, 35 A. 899 (Supr. Ct. 1896), Chief Justice Beasley had stated in interpreting the New Jersey Wrongful Death Act at page 900 of *Atlantic*:

“ * * * From these extracts from the statute it will be at once perceived that in this suit, founded upon it, as in all others of the same class, but two questions are raised, and but two can be raised upon the record, viz: *First, could the deceased, if he had survived, have maintained an action?* And, second, this being so, what pecuniary loss has fallen on his next of kin by reason of his death? * * * ” (Italics ours.)

The above is quoted with approval in *Bastedo v. Frailey*, 109 N. J. L. 390, 162 A. 621 (E. & A. 1932). In view of the above, the Court of Appeals properly held that the test of liability, i.e., the right to maintain an action was determined by the rights the deceased would have had if he had lived. See also *Coulter v. New Jersey Pulverizing Co.*, 11 N. J. Misc. 5, 163 A. 661 (Supr. 1932), where it was held that suit could not be brought for wrongful death where the Statute of Limitations had run before the death of the deceased, because “the statute only gives an action if the deceased had one.” Not only is the nature and extent of the liability under the New Jersey Wrongful Death Act made co-extensive with the liability the deceased could have alleged if he lived, but the broad wording of the statute permits recovery for unseaworthiness as well as negligence.

Judge Staley, writing for the majority in the *Skovgaard* case stated:

"We hold that failure to provide a seaworthy vessel in the case before us is such 'wrongful act, neglect or default' as will allow recovery under the New Jersey Wrongful Death statute."

Judge Learned Hand in the *Halecki* case held with reference to the New Jersey Statute and the warranty of seaworthiness (Pet. 28a):

" * * * We hold that 'neglect' and 'default' both cover a breach of the warranty."

The conclusions of Judge Staley and Judge Learned Hand are amply supported. In *Judson v. Peoples Bank & Trust Company of Westfield*, 17 N. J. 67, 110 A. 2d 24 (1954), in constructing the meaning of the "wrongful act, neglect or default" of joint tortfeasors Mr. Justice Brennan held that the phrase included all torts of commission and omission. See also *Burns v. Bethlehem Steel Co.*, 20 N. J. 37, 118 A. 2d 544 (1955), where the words "wrongful act, neglect, or default" in a limitations statute were held to include a cause of action for personal injuries whether the action was based on tort or contract concepts.

In *Orez v. American President Lines, Ltd.*, 154 Fed. Supp. 241 (S. D. N. Y. 1957), the phrase "wrongful act, neglect, or default" as used in the New Jersey statute of limitations was held to include a claim based on unseaworthiness. The same phrase in the New York Wrongful Death statute has been held to include an action based on a warranty of fitness for use. *Greco v. Kresge*, 277 N. Y. 26, 12 N. E. 2d 557 (1938). The construction given to the New Jersey Wrongful Death Act by the Court of Appeals was reasonable and in full accord with the decisions of the courts of New Jersey interpreting the act. No New Jersey case directly or indirectly stands for the proposition which petitioner urges this court to adopt.

The construction given by the Court of Appeals is further buttressed by the fact that the New Jersey courts regard the New Jersey Wrongful Death Act "entirely and in the highest sense remedial in its nature." *Haggerty v. Central Railroad Co.*, 31 N. J. L. 349 (Supr. Ct. 1865). In construing it, "the rule is to avoid all subtle inventions and evasions for the continuance of the remedy" and "the duty of the court is to add force and life to the cure and remedy." *Murphy v. Board of Chosen Freeholders of Mercer County*, 57 N. J. L. 245, 31 A. 229 (Supr. Ct. 1894). See also *Hartman v. City of Brigantine*, 42 N. J. Super. 247, 126 A. 2d 224 (App. Div. 1956), aff'd 23 N. J. 530, 129 A. 2d 876 (1957). Aside from the rule of construction that a remedial statute is to be liberally construed the court also must adopt a reasonable and fair construction in preference to a harsh or arbitrary one. If the construction of the Court of Appeals is rejected then an absurd situation would arise. Where a deceased died on a vessel in navigable waters of the United States and within the geographic area of a state his survival cause of action would be determined under maritime law, *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 36, 74 S. Ct. 202, 98 L. Ed. 143 (1953), while the wrongful death action would be determined by analogous state law applied to situations on land. Cf. Comment of Judge Woodbury in *O'Leary v. United States Line Company*, 215 F. 2d 708 (1 Cir. 1954), cer. den. 348 U. S. 939, 75 S. Ct. 360, 99 L. Ed. 735 (1955). In the absence of any direct statement in the statute or any construction by the New Jersey courts that such an absurd situation was a desired purpose of the New Jersey Wrongful Death Act, the Court of Appeals properly gave the statute a fair and reasonable construction.

Obviously the purpose of the act is to incorporate the test of liability which would have existed if the deceased had lived. In this respect the next of kin are given neither

greater or smaller rights than the deceased. In a case where the deceased died as a result of injuries received while a business invitee in a retail store, the law relating to the rights and duties of business invitees and storekeepers would apply. By the same logic where the deceased died as a result of injuries received on navigable waters within the boundaries of a state the law relating to the rights and duties of shipowners and those who come on board would apply. Since *Pope & Talbot, Inc. v. Hawn*, cited *supra*, the law applied would be the maritime law of the United States. It would be unreasonable to conclude that the legislature of New Jersey intended it otherwise particularly in view of the referral nature of the statutory language.

The New Jersey Wrongful Death Act does not have any language in it setting forth either contributory negligence or assumption of risk as defenses to an action brought under it. Judge Learned Hand in the *Halecki* case held specifically (Pet. 30a):

" * * * and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar."

Judge Learned Hand's determination in the *Halecki* case is consonant with a reasonable interpretation of the New Jersey Wrongful Death Act. The test of liability is coextensive regardless of whether the deceased had lived and recovered for his personal injury or dies and his next of kin sue. It would require a finding of unreasonable logic on the part of the New Jersey legislature in passing a remedial statute to hold that a widow's claim could be barred by contributory negligence, however, slight it may be, but that the deceased, if he had lived could have re-

covered. The legislature did not intend such a result. It did not specifically set forth such defenses. Instead it used a "referral test" for the very purpose of avoiding such an anomaly. See *The Devona*, 1 Fed. 2d 482 (D. C. Me. 1924).

POINT III

The deceased was entitled to a seaworthy vessel at the time of his death.

Judge Learned Hand in discussing the question of the duty of the defendants to supply the deceased with a seaworthy vessel stated (Pet. 26a):

" * * * . *We can see no distinction between the work of the decedent in the case at bar and that of the plaintiff in Pope & Talbot v. Hawn, supra. (346 U. S. 396), which was carpenter's repair work. We think that the test is whether the work is of a kind that traditionally the crew has been accustomed to do, and as to that it makes no difference that the means employed have changed with time, or whether defective apparatus was brought aboard and was not part of the ship's own gear. Since the deceased was cleaning the ship, we hold that it was within the doctrine of Pope & Talbot v. Hawn, supra.*

As might be expected, so shadowy a line of demarcation will in application produce inconsistent results. For example, in *Read v. United States*, 201 F. 2d 758, the Third Circuit held that the warranty extended to a 'business guest' who was doing part of the work of changing a 'Liberty' ship into a transport, while the Ninth Circuit in *Berryhill v. Pacific Far East Line*, 238 F. 2d 385, cert. den. 354 U. S. 936, refused relief to a workman who was engaged in 'major repairs,' as these were described in the District Court (138 Fed. Supp.

859). In the appeal in *Berge v. National Bulk Carriers, Inc.* (148 Fed. Supp. 608), decided herewith, we shall state the reasons that impel us to prefer the decision of the Ninth Circuit, but it is not necessary to pass on that question here, because as we have said, *the work did not involve any structural changes in the ship, but was of a kind that was part of the crew's work, not only at sea, but when she was laid up for general overhaul.* We start therefore with the conclusion that it was proper to leave to the jury, not only the issue of negligence, but that of unseaworthiness. (Italics ours.)

The defendant's vessel in the present case, was getting its "annual overhaul" at the time of the accident. The defendant's witness, Walter C. Thompson, characterized the "annual overhaul or the annual repairs" (p. 76a):

"A. Well it consists of painting the boat, *making minor repairs*, changing the lines, working on the engine room, and so forth." (Italics ours.)

The vessel had remained in the water at Rodermond Industries for about three weeks (pp. 15a; 75a). The captain of the vessel was on board the vessel every day (p. 64a). In addition there were four or five deckmen on board and the full complement of engineers and engine room crew on board (p. 65a). Some men slept on board the vessel (p. 65a). According to the specifications the *ship's crew* were to "remove and place the 8 cylinder heads" on the very generators the deceased cleaned (p. 89a). The ship's crew worked during the "annual overhaul" alongside of the contractors and the work was done under the orders and supervision of defendant's Captain, Chief Engineer and Marine Superintendent (pp. 9a; 10a; 67a; 68a; 70a; 72a).

The use of electrical equipment on board a vessel is of comparatively recent origin. However, the electrician on board a modern vessel serves as important a function in the ability of the vessel to navigate as any other member of a vessel's crew. The agreement between the National Maritime Union of America and various companies and agents in Atlantic and Gulf Coast Ports of June 16, 1956 lists the following specific unlicensed personnel classifications under the agreement: "Electricians," "Watch Electricians," "Day Electricians," "Second Electrician," "Deck Electrician," "Maintenance Electricians." This illustrates the fallacy in the contention of the defendant that the work of the decedent was not work "traditionally performed by seamen." Modern vessels are large and complex mechanisms. Even those vessels that are not electric motor ships use large quantities of electrical equipment for lighting and other functions on a vessel. Obviously, whatever their designation, each such vessel must have one or more members of the crew who are trained to inspect, clean, and maintain electrical equipment on board. Sometimes a particular vessel may not have a crew member sufficiently skilled to perform certain types of electrical work, which could otherwise be performed by a competent member of the crew if one were on board. This does not operate to make the work any less work "traditionally performed by seamen." The fact that the owner may seek to have certain types of maintenance work done by a contractor employee and "seeks to have it done with the advantages of more modern divisions of labor" to use Mr. Judge Rutledge's words, "does not minimize the hazard and should not nullify his protection." *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946).

The peculiarities of maritime conditions apply to electricians as well as to other members of the crew. It is the requirement of working in confined places and in the peculiar conditions caused by the limitations of space, machinery,

and structure, inherent in the design of a vessel that creates special risks.

POINT IV

There was no disagreement in the Court of Appeals concerning the fact that the evidence would support a verdict based on negligence.

There was no disagreement in the Court of Appeals concerning the fact that there was sufficient evidence which would warrant a recovery on the ground of negligence. Judge Lombard based his dissent on the issues of unseaworthiness and comparative negligence. He did not state that he would have dismissed the complaint entirely but rather that he would have remanded the case for a new trial on the issue of negligence only. He could come to this conclusion only if he felt that there was evidence from which a jury could conclude that the defendants were negligent (Pet. 39a). Therefore the trial judge and the three judges of the Court of Appeals who reviewed the record in this case all agreed that there was sufficient evidence from which a jury could find that the defendant had been negligent.

The defendants had an affirmative non-delegable duty to provide a reasonably safe place to work. See *Weyerhaeuser S.S. Co. v. Nacirema Operating Co.* U. S. 78 S. Ct. 438, L. Ed. (1958); *Gunnarson v. Robert Jacobs, Inc.*, 94 F. 2d 170 (2 Cir. 1938) cert. den. 303 U. S. 660, 58 S. Ct. 764, 82 L. Ed. 1119 (1938); *Guerrini v. United States*, 167 F. 2d 352 (2 Cir. 1948); *Anderson v. Lorentzen*, 160 F. 2d 173 (2 Cir. 1947); *Puleo v. H. E. Moss*, 159 F. 2d 842 (2 Cir. 1947).

The factual findings in this death case were amply supported by the evidence and were within the province of

the jury. *Schultz v. Pennsylvania R. Co.*, 350 U. S. 523, 76 S. Ct. 608, 100 L. Ed. 668 (1956); *Lavender v. Kurn*, 327 U. S. 645, 66 S. Ct. 740, 90 L. Ed. 916 (1946).

CONCLUSION

The petition should be denied because

- (a) The issues were fully and completely presented and argued in the court below and were correctly decided.
- (b) The issue basically involves the interpretation of the New Jersey Wrongful Death Act and the interpretation of the court below is supported by the language of the statute and the decisions of the New Jersey courts to the extent they are applicable.
- (c) The decision of the court below logically follows and is fully consistent with the decisions of this court and the decisions of other courts dealing with the interpretation of other state acts are not in conflict therewith.

Dated: Hoboken, N. J.
May , 1958.

Respectfully submitted,

NATHAN BAKER

Counsel for Respondent

1 Newark Street
Hoboken, N. J.

BERNARD CHAZEN, Esq.

MILTON GARBER, Esq.

On the Brief

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Supreme Court of the United States

OCTOBER TERM, 1958

No. 56

**UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION, a corporation and UNITED NEW YORK SANDY
HOOK PILOTS ASSOCIATION, a corporation,**

Petitioners,

—against—

**ANNA HALECKI, Administratrix ad Prosequendum of the
Estate of Walter Joseph Halecki, deceased, and ANNA
HALECKI, Administratrix of the Estate of Walter Joseph
Halecki, deceased,**

Respondent.

BRIEF FOR RESPONDENT

NATHAN BAKER

Counsel for Respondent

1 Newark Street

Hoboken, New Jersey

BAKER, GARBER & CHAZEN

Attorneys for Respondent

BERNARD CHAZEN

MILTON GARBER

On the Brief

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1958

No. 56

UNITED NEW YORK AND NEW JERSEY SANDY HOOK PILOTS
ASSOCIATION, a corporation and UNITED NEW YORK SANDY
HOOK PILOTS ASSOCIATION, a corporation,

Petitioners,

—against—

ANNA HALECKI, Administratrix ad Prosequendum of the
Estate of Walter Joseph Halecki, deceased, and ANNA
HALECKI, Administratrix of the Estate of Walter Joseph
Halecki, deceased,

Respondent.

BRIEF FOR RESPONDENT

Counter-Statement of Questions Presented

1. Whether a state, in enacting a Wrongful Death Act, may refer the standards of liability to the standards to be applied if the deceased had lived which, in the case of an accident on navigable waters of the United States, would be the general maritime law?
2. Whether the words "wrongful act, neglect or default" as used in the New Jersey Wrongful Death Act include an action based on unseaworthiness?
3. Whether the New Jersey Wrongful Death Act, which does not specify in the statute what defenses, if any, are available under its terms but uses a referral test for liability thereunder, incorporates the Maritime Law Rule of

comparative negligence where such Rule would have been applied to an action by the deceased if he had lived?

4. Whether or not an electrician was entitled to a sea-worthy vessel, where he was doing maintenance work on navigable waters in a vessel with a captain and crew on board who had participated in such work and the work was within the range of work traditionally performed by seamen with qualifications as electricians?

Counter-Statement of Facts

On or about September 24, 1951 the petitioners contracted with Rodermond Industries, Inc. of Jersey City, New Jersey to have certain work done on the Pilot Boat "New Jersey" (P89a).

The list of items for work to be done was admitted in evidence as Exhibit 5 and also Exhibit 6 (R. 73). It provided in part (R. 146):

"Crew to remove and replace the 8 cylinder heads for the port and stbd generators.

Contractor to remove the eight (8) heads to the ship, disassemble same, grind in the valves, thoroughly clean out the head, reassemble and return to vessel. Stone commutators to remove high spots and ridges and cut clean to mica all segment bars. Clean and adjust brush riggings and brushes.

Spray clean with carbon tetrachloride the armature and field windings to remove all traces of dirt and film. Close up and prove in good order." (Italics ours.)

Mr. Doidge the foreman for the employer of the deceased, testified that with reference to the above quoted item he had consulted with the chief engineer on the boat (R. 73). They agreed that the carbon tetrachloride work which had been specified in the contract would be done on Saturday, September 29, 1951 (R. 74). He also testified (R. 74):

"Q. Did you discuss the danger of the use of this carbon tetrachloride with the chief engineer at that time? A. I don't think so. We just take those things for granted. We knew what it was all about.

The Court: That is the reason you discussed fixing a particular time when to do the work?

The Witness: That is right, your Honor."

The captain of the defendant's vessel was in court but he was not called upon to testify (R. 137). The plaintiff had read parts of the testimony on deposition that Captain Haley had given during the presentation of the plaintiff's case (R. 121-130). He had testified that he was the captain of the New Jersey on September 29, 1951 (R. 121). On that date the vessel was located at Rodermond Industries in Jersey City for "the annual overhaul" (R. 122). Captain Haley testified among other things (R. 123):

"Q. When you brought it there, was it brought by you and the officers and your complete crew? A. That is correct, sir, and the Marine Superintendent was aboard, too.

Q. When you say the marine superintendent, the marine superintendent of what company? A. Of our organization."

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"Q. What took place when you first brought the vessel into Rodermond Industries pier in Jersey City? A. Well, as far as I can recollect, we went up to see the yard superintendent and also the different—what do they call them, various superintendents and snappers or bosses like they say in the shipyard. We discussed what we were going to do with the vessel."

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"Q. Just tell me what you did in reference to the vessel. A. We were moored in Rodermond Industries, and I was on board every day during the working hours."

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"Q. And what were the work hours? A. From 7:30 until anywhere up to 5, 6 or 7 o'clock at night.

Q. And that was every day while it was at the Rodermond Industries pier? A. With the exception of week-ends, naturally.

Q. During the period of time that you were aboard the vessel while it was at Rodermond Industries pier, during the working hours that you have described, what were your duties aboard the vessel or what did you do aboard the vessel? A. Usually when you go into a yard like this you have a certain amount of deck work to do, like painting, and fixing up minor repairs, a general overhaul of the deck department, renew lines and take care of the general appearance of the vessel, the bridge, the galley, the mess-hall, your rooms, you paint them, and so forth.

Q. Who would do that? A. That would be the deck department.

Q. You mean the deck department of the vessel? A. Of the vessel.

Q. That has nothing to do with Rodermond Industries? A. No, sir."

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"Q. During that period of time when it was in the Rodermond Industries yard, during that period around September 29, 1951, could you tell us what the skeleton officers and crew consisted of that remained aboard the vessel to the best of your recollection? A. To my best recollection I had myself, who, as I recall, was the only officer in the deck department, and then I had approximately four or five deck men.

Q. And the engine department? A. We do not have anything to do as far as the engine goes. Do you want me to elaborate?

Q. I will also ask you to go into the engine department, officers and crew of the engine department. A. *We had the full complement of engineers and engine room crew aboard.*

Q. During that period of time? A. That is correct.

Q. What were the engineers and the engine room crew doing in general aboard the vessel while it was in

Rodermond Industries during that period of time? A. *They were maintaining the engines and any other specific work that we had to take care of.*

Q. Were they also present during the night hours, the engine department? A. In some cases you would have men sleeping aboard the vessel at night.

Q. During that period of time while the vessel was at Rodermond Industries shipyard did the engine department have an officer and crew during the night hours? A. As a standby or as a watch? What do you mean by that?

Q. Anyway at all. A? Well, *at night*, yes. I will say that *there was somebody that represented the engine department aboard the vessel on most of the occasions.*"

He testified (R. 126):

Q. What was your job or what were your duties during that period of time when the Rodermond Industries were doing some repair work, what did you have to do with reference to the vessel while that repairs work was going on? A. Well, the repair work was represented by the marine superintendent who during the working hours inspected and went around the vessel to see that the different jobs were being done, and discussing the jobs with the snappers, and taking a general interest in that particular work that was being done by Rodermond Industries."

He testified (R. 128):

Q. Then *during this entire time* while Rodermond Industries were doing their work, their repair work, *you have your own deck crew on the vessel doing certain maintenance work and painting work and so forth on board the vessel?* A. *That is true, yes sir.*

Q. Did your deck crew do that work only the five working days of the week, or did they do such work on Saturdays and Sundays, if you recall? A. If it was necessary they would work on a Saturday or a Sunday.

Q. Did your deck crew work on September 29, 1951, which was a Saturday? A. I had one man there.

Q. Who did you have there? A. Walter Thompson.

Q. What was his position? A. He was to maintain a watch."

He testified (R. 129):

"Q. And the inspection of the vessel while it was at Rodermond Industries would also be under your jurisdiction? A. Mine and the marine superintendent.

Q. *And if either you or the marine superintendent discovered any unsafe conditions aboard the vessel it would be up to you or him to see that they were corrected?* A. *Well, naturally.*"

On cross-examination by his own attorney, he stated (R. 130):

"Q. Captain, can you tell me the purpose for which the ship was put into Rodermond Industries? A. For the annual overhaul.

Q. Just briefly what did that consist of? A. That consisted of deck and engine work.

Q. Repairs and overhaul? A. Repair and overhauls, yes.

Q. Was that work done under your orders? A. No sir.

Q. To your knowledge was it done under any orders of any of the members of the Pilot Association? A. *Under the orders of the marine superintendent.*

Q. When you say under the orders of the marine superintendent, you mean in accordance with the specifications? A. That is correct." (Italics ours.)

Not only did the defendant fail to call the Captain of the vessel as a witness, but it failed to call the Chief Engineer of the vessel either, although he was still employed by them (R. 138). Nor did the defendant call its Marine Superintendent to testify although he was still employed by them (R. 139). In fact it didn't call any wit-

ness except Walter C. Thompson, the man who was on watch and its medical and engineering experts who did not have direct knowledge of the situation.

The deceased was 40 years old at the time of his death (R. 68). He had a wife and three infant children (R. 68). He was an electrician employed by the K & S Electrical Company (R. 69). In September of 1951 he worked under Donald Doidge who was a foreman (R. 71). The deceased and Doidge brought a blower belonging to Rodermond Industries on board the vessel on Friday for use on Saturday (R. 81). It was placed in position about 7 or 8 feet above the engine room floor and tied to a rail (R. 82). The Chief Engineer of the vessel had been present on Friday when Doidge made preparations and put the blower in position. (R. 76; R. 82).

On Friday Doidge had sprained his wrist (R. 93). Consequently on Saturday he found that he couldn't hold a spray gun and press the trigger on it because of the condition of his wrist. The deceased took over the spraying and Doidge just helped him "move the stuff around" (R. 93). Doidge did spray for two or three minutes before he gave up (R. 93). Doidge went down into the engine room while the deceased sprayed but later on he didn't go down every time with the deceased (R. 94). The deceased would spray for 15 or 20 minutes and would come out of the engine room. Then he'd repeat the procedure (R. 94). Mr. Doidge testified (R. 94):

"Q. During the time that he was spraying in the engine room, you stayed on top of the deck? A. At first I stayed down—the first two or three times down there I stayed down with him altogether. Then, as the can got higher he could move it a little himself and then I wouldn't go down quite as much. I would just look in from the top of the engine room."

Mr. Doidge and the deceased started to work about 8:30 a. m. on Saturday morning (R. 92). They started spraying about 8:45 or 9:00 a. m. (R. 92). They stopped for lunch at noon for about half an hour and then they resumed work until about 3:00 or 3:30 p. m. (R. 94). They both left the vessel. The deceased complained of a "peculiar taste in his mouth" (R. 95). The defendant's crew member who had been on watch testified that "at the end of the day one of the fellows just said he wasn't feeling well" (R. 136).

Both Doidge and the deceased used three gas masks supplied by K & S Electric Co. (R. 91). They were regular Army surplus gas masks (R. 91). Doidge checked the gas masks before they used them (R. 99). He stated that whenever he saw the deceased working below he wore a mask (R. 101). Mr. Doidge also testified on cross-examination that the gas masks were not defective because the Police Department had checked the masks after the accident and he received a report from them (R. 105; R. 106).

The cause of death of the deceased was admitted. During the cross-examination of defendant's medical expert, the trial court asked (R. 142):

"The Court: The autopsy diagnosis was death from carbon tetrachloride poisoning. You are in agreement with that?

The Witness: Yes, sir.

The Court: I think everybody is in agreement on that. Is there any question about that?

Mr. Mahoney: The defendant does not take issue with that, your Honor."

The great danger involved in the use of carbon tetrachloride in a confined place without proper ventilation was not disputed (R. 74; R. 97; R. 104; R. 108; R. 112; R. 143).

In petitioner's brief it is stated that "the decedent drank excessively" (P. br. 58). This statement is not accurate.

Mrs. Halecki denied her husband was a drunkard (Transcript P30). Mr. Doidge testified (R. 95):

"Q. How was he with reference to being sober? Was he sober or not on the job? A. I never seen him take a drink. Of course he was like any man, he would like to take a drink once in a while, like any man, but in the approximate six years I knew him I never saw him under the influence of liquor or anything else.

Q. Was he sober on the job? A. Very, very."

The defendant's own expert had conceded on cross-examination the weakness of the assumption defendant asserts (R. 142):

"Q. And from the autopsy findings as you examined them was there any evidence of any alcoholism? A. (No response.)

Q. Is there anything like that in the report? A. No, there isn't anything in the report that mentions alcoholism. There is no reason why the report would mention that unless it had a positive finding to that effect, but there are many effects of alcohol that are not evident in any autopsy report."

"Q. With respect to alcoholism? A. Yes, I would not insist on that interpretation, not having seen the liver."

Dr. Robert P. Gaines was called upon to testify for plaintiff. He had a Ph.D. in chemistry and was a biochemist with specialty in toxicology and public safety (R. 108). He testified that carbon tetrachloride is a member of the methane series in organic chemistry; that it had a specific gravity of 1.54 which means it is heavier than water; that it had a boiling point of 77 degrees Centigrade which meant that it was "rather volatile" (R. 109). Carbon tetrachloride is about 5 times heavier than air (R. 115).

He stated that at one time it was used as a medicine to eliminate worms but this was discontinued when it was discovered that this was a "toxic substance." It then became popular in connection with fire extinguishers because it was a non-conductor of electricity and could be used where electrical devices were involved. However it was found that these fire extinguishers when use in confined places caused poisonings and warning labels were subsequently affixed to them (R. 109). It was discovered that carbon tetrachloride was an ideal, economical, and efficient solvent where grease was involved and it came into more general use. Then it was discovered that employees in industries where the chemical was in wide use began to develop complaints. Studies were then made by public health authorities about 20 years ago and it was found that the chemical could be used if "adequate ventilation was provided" (R. 111). A concentration of 50 to 100 parts per million of carbon tetrachloride was considered safe (R. 111). Dr. Gaines also developed in his testimony the toxicological process by which the chemical affected the human body (R. 112). He testified that exposure or inhalation of carbon tetrachloride in an amount beyond the safe concentration would be "obviously harmful and deleterious" (R. 112). The concentration stated by the expert represents weight per unit volume and reflects the concentration of strength (R. 113).

Dr. Gaines testified that in view of the fact that carbon tetrachloride is about five times heavier than air it would sink to the bottom of the engine room and have the greatest concentration there (R. 115). The blowers would merely act to agitate or stir up the air in the engine room rather than replace it or remove it (R. 115). Proper ventilation would require ventilating ducts at floor level (R. 117).

Doidge testified that the engine room was approximately 40 feet long, 30 feet wide and about 18 feet high (R. 5).

He stated that they had used 8 gallons of carbon tetrachloride (R. 6). Dr. Gaines computed on the basis of these dimensions and without considering the displacement by machinery in the room that this involved 21,600 cubic feet of air (R. 22). He testified that temperature variations except where the freezing point is reached would make very little difference in volatilization (R. 23). Taking a temperature of 25 degrees Centigrade as an average temperature, Dr. Gaines concluded that in a space 40 by 30 by 18 feet, eight gallons of carbon tetrachloride sprayed in six hours would produce a concentration of 20,000 parts per million (R. 23). There was machinery in this room (R. 140). This, as a matter of physical fact, would increase the concentration and the danger. This would produce at least 200 times the allowable safe concentration (R. 24). Dr. Gaines testified (R. 31):

"The Court: The actual concentration in the area, of course, would depend upon the effectiveness of the ventilating units; is that correct?"

The Witness: And the amount of material present.

The Court: When you say the amount of material present, I don't follow that.

The Witness: That is, whether they used a pint bottle or a gallon bottle, or five gallons.

The Court: Well, to put it more specifically, I thought my question was clear, you gave a figure of 20,000 parts per million. Is it correct to suggest that that is the maximum which does not take into account any of the ventilating items contained in that?

The Witness: Yes.

The Court: Because in reaching that figure you excluded all ventilating factors.

The Witness: Yes, I used that in a confined area.

The Court: And accordingly the actual concentration per million in that engine room would depend upon the effectiveness of the ventilating units?

The Witness: Yes, and we believe that we used those measurements without allowing for displacement by equipment."

However he also testified (R. 119):

"Q. The Court will ask a question at this time. Of course, your answers were based upon the hypothetical information given to you when Mr. Baker questioned you. He described these various items of ventilation.

A. Yes, sir.

Q. And I take it to that extent, at least, your answer was based upon a hypothetical state of facts? A. Limited within that, yes.

Q. Counsel just asked you whether or not you knew that these various items were functioning properly and you said you didn't know? A. Of course not.

Q. I say to you now that the evidence in the case is that all these items were operating properly and functioning properly on the day in question. That is the testimony of Mr. Doidge. Would that make any difference in your answer as to the extent of concentration on that day in that area? I want to assure both counsel it is their duty to object to the question if it should be objected to.

Mr. Mahoney: No objection. I understand that is the evidence.

A. If his Honor pleases, I recall two doors being on the side at about eight feet above floor level. That door would be the only factor in the testimony or in the items introduced as being somewhat efficacious in removing the vapors, because that was low down, near to the floor.

The circulating fan would have no bearing on the removal of the vapors. It would merely act as a circulating agent. The air hose, which was supplied near the operator's face, would have no effect at all on the diminution or the increasing of the concentration. I recall now an exhaust pipe sucking air out of this room, and I believe that would have—and I do say that—without any hesitation I say that that would be instru-

mental in diminishing the concentration in the room, but as to how much I cannot say.

I recall a hose near the ceiling as coming in with fresh air. That, sir, would be very little because it would be merely blowing in fresh air which would be increasing the concentration at the lower level.

Then the two skylights that are open again would have no effect on ventilation, but it would have on dilution because we must bear in mind, sir, that this vapor is more than five times heavier than air, 5.3 or .4. I said three times heavier before, and I meant five.

Therefore your concentration would be increased near the floor level and gradually increased as it goes up. I would say that all the items that were enumerated by both attorneys would have some effect, especially the doors and your exhaust. The others would have a negligible effect. Do I answer the question, sir?"

The defendant's expert engineer on cross-examination confirmed Dr. Gaines's opinion (R. 143):

"Q. In your opinion, was that system adequate to remove carbon tetrachloride from the engine room?
A. In my opinion it was not.

Q. And why do you say that, Mr. Finkenaur? A. I don't see how you could expect any ship's ventilating system to take care of those noxious gases that are introduced, and particularly those that are heavier than air and lie down near the bilges. You would have to have a special blowing device to stir that air up and permit it to circulate out with the rest of the exhausted air."

Judge Weinfeld fully and fairly set forth all the issues in his charge to the jury. The jury returned a verdict for \$62,500 for the pecuniary loss to the widow and dependent children and for \$2500 for conscious pain and suffering of the decedent (R. 64). Defendant moved to set aside the verdict, for judgment notwithstanding the verdict, and for a new trial. All motions were denied (R. 65).

Judge Learned Hand, writing the majority opinion, affirmed the judgment of the District Court. *Halecki v. United New York and New Jersey S. H.P. Ass'n*, 251 F. 2d 708 (2 Cir. 1958). After reviewing the evidence he stated that there was sufficient evidence to support a finding of negligence (R. 150). Apparently Judge Lombard, who dissented, did not disagree with this part of the opinion for he would have granted a new trial on the issue of negligence (R. 160). Referring to the case of *Skovgaard v. The Tungus*, 252 F. 2d 14 (3 Cir. 1957) the court held that the words of the New Jersey Wrongful Death Act included by definition an action based on a breach of the warranty of seaworthiness (R. 152). Judge Learned Hand stated as to contributory negligence (R. 153):

" * * *. Although, as we have said, we are not dealing with 'federal maritime law,' we should remember that so far as we can we ought to construe the statute so as to avoid capricious and irrational distinctions. We leave open whether New Jersey is without power to take as much or as little of the rights 'rooted in federal maritime law' as it chooses as the model for the right it confers upon the next of kin; but the courts of that state have never passed upon the question, and to deny the exemption to the next of kin seems to us to the last degree capricious and irrational. * * *. Obviously, the answer is not certain; we must do as best we can with what we have, and we hold that the New Jersey statute should be construed as taking over as a part of the model it accepted the exemption of contributory negligence as a bar."

This court has granted certiorari (R. 172).

Summary of Argument

The deceased, if he had lived, would have had his rights and duties with relation to petitioner's vessel, which was not on the high seas but was in the navigable waters of the United States, determined by the general maritime law. However, since his injuries resulted in his death an additional factor appears. The general maritime law, which has no positive rule denying recovery for wrongful death but merely has a void in the general body of maritime law on this question, in order to permit a remedy in this situation adopts and enforces a state wrongful death act where it would otherwise apply. Where, as in the case of the New Jersey Wrongful Death Act, it appears that the statute itself makes the test of liability the rights of the deceased if he had lived there is no conflict between the general maritime law and the state statute. The maritime law would determine the rights of the deceased if he had lived and hence the state statute incorporates the general maritime law by reference in this situation.

Only if it were concluded that the state statute, in spite of its referral language, required the application of state-law principles of analogous land situations does the possibility of conflict between state law and general maritime law arise. The New Jersey Wrongful Death Act does not present such a problem. If it did, the general maritime law would adopt only so much of it as is necessary to fill the void in the general maritime law and the rest would fall in the face of the positive rules of maritime law. The rule of comparative negligence is a positive rule of the maritime law.

The rule of comparative negligence would be applied in this case because the New Jersey Wrongful Death Act does not specifically list the defenses which would be avail-

able to a person sued under its provisions but uses language referring to the right of the deceased to maintain an action if he had lived. In addition, even if the New Jersey statute did provide, specifically for the defense of contributory negligence of the deceased where an action was instituted by a non-negligent widow and children the general maritime law would apply its own positive rule of comparative negligence rather than the discredited common-law rule of contributory negligence.

In addition to the referral features of the statute, it uses the words "wrongful act, neglect, or default" which are broadly construed in accordance with the remedial intent of the legislature in enacting the statute. It therefore includes an action based on unseaworthiness as well as on negligence.

The work performed by the deceased, at the time of his injury was ship's work. It could have been done by any qualified member of a ship's crew. Modern vessels carry a great deal of electrical equipment on board and have on board electricians and other members of the ship's engineering force who operate, repair, and maintain electrical equipment. The work done by the deceased in spray cleaning the armature and field windings to remove traces of dirt and film on the generators was in the nature of ship's maintenance. It was in no sense a major repair. The vessel remained tied up and in the water. It had both a captain and a crew. During the period the vessel was tied up the vessel's crew worked on the vessel in the same parts of the ship as did the deceased. The deceased was entitled to a seaworthy vessel.

The failure of the vessel to have adequate ventilation at the time the deceased worked with carbon tetrachloride pursuant to the specification prepared by the vessel rendered the vessel unseaworthy. Furthermore since the offi-

cers of the vessel knew that the work to be done involved the use of carbon tetrachloride in a confined place and they knew or should have known that it was dangerous in confined places and that the ventilation available was inadequate and rendered the place of work unsafe they breached a non-delegable duty to provide the deceased with a safe place to work.

The evidence amply supported the verdict of the jury. The decision of the Court of Appeals should be affirmed.

POINT I

The plaintiff's deceased husband was entitled to a seaworthy vessel and she could recover for his death resulting from the failure to supply a seaworthy vessel.

(a) *The deceased was engaged in performing "ship's work" and entitled to the warranty of seaworthiness.*

The trial judge stated in his charge to the jury (R. 44):

"Halecki as an electrician engaged in cleaning the generators was performing a function usually carried out by a ship's crew. Under this circumstance, the law imposes upon the defendant, the Association, the same duty it owed to its regular crew members that is, to supply Halecki with a seaworthy vessel."

The test by which the duty to furnish a seaworthy vessel to one other than a member of the crew is judged was set forth by the United States Supreme Court in *Pope & Talbot Inc. v. Hawn*, 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953). Mr. Justice Black stated at page 412:

" * * * We reject it again and adhere to *Sieracki*. We are asked, however, to distinguish this case from our holding there. It is pointed out that *Sieracki* was a 'stevedore.' *Hawn* was not. And *Hawn* was not loading the vessel. On these grounds we are asked to deny

Hawn the protection we held the law gave Sieracki. *These slight differences in fact cannot fairly justify the distinction urged as between the two cases. Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. * * ** (Italics ours.)

In the *Hawn* case the injured workman was a carpenter. The court in the *Hawn* case had refused to place any limitation on the *Sieracki* case and clearly advised that the warranty of seaworthiness did not depend on the label given to a workman's occupation but does depend on the relationship of the work done. Seamen have traditionally performed and do perform many tasks which are classified as "ship's work." These are not limited to loading and unloading but include cleaning and maintenance as well. The deceased in this case was doing "ship's work" because, at the time he was injured, he was cleaning certain ship-board electrical equipment. The specifications refer to the work the deceased was doing as "spray clean with carbon tetrachloride" (Exh. P-5, R. 146). This was basically maintenance work, maintenance work is work traditionally performed by seamen. In fact, the ship's crew was actually participating in the cleaning and maintenance work being done on the vessel and, as their share of the work under the specifications, actually removed the 8 cylinder heads of the generators which the deceased cleaned (R. 146). Also, the ship's crew were working on the vessel's engines. Donald Doidge testified (R. 75):

"Q. And were the members of the ship's crews and officers, were they aboard the vessel all week? A. Yes, sir.

Q. What were they doing aboard the vessel all week? A. Well, the engine crew were working on the diesel engines down below decks.

Q. Now what were they doing with them? A. They were removing the heads on the diesel engines, I don't know in reference to what.

Q. That was the ship's crew that was doing it? A. That is right.

Q. And you saw them working there? A. Oh, yes."

The fact that members of the ship's crew also worked in the area where the deceased worked has significance. In *Crawford v. Pope & Talbot*, 206 F. 2d 784 (3 Cir. 1953) where tank cleaners recovered for the unseaworthy condition of a vessel, Chief Judge Biggs stated at page 790:

" * * * Their work in the deep tanks were clearly 'ship's work' within the meaning of the *Sieracki* case. At the very time Crawford and Lucibello were engaged in cleaning the deep tanks in No. 1 hold, seamen of the ship were similarly engaged in the deep tanks in an adjoining hold. Had one of those seamen been injured under circumstances like those before us, he would clearly have been entitled to recover for unseaworthiness of the ship. We see no reason for differentiating the situation of the present libellants. Moreover, as our discussion of the unseaworthiness of the *Jones* has indicated, the safe and successful completion of Crawford's and Lucibello's work was closely dependent upon the cooperation of the ship in furnishing needed appliances. This dependence supports our conclusion that the doctrine of unseaworthiness covers the injured parties here."

The basis for the duty to provide a seaworthy vessel to those engaged in "ship's work" was stated by Mr. Justice Rutledge in *Seas Shipping v. Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946) at page 95:

" * * * All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers."

whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection. The risks themselves arise from and are incident in fact to the service, not merely to the contract pursuant to which it is done. The brunt of loss cast upon the worker and his dependents is the same, and is as inevitable, whether his pay comes directly from the shipowner or only indirectly through another with whom he arranges to have it done. The latter ordinarily has neither right nor opportunity to discover or remove the cause of the peril and it is doubtful, therefore, that he owes to his employees, with respect to these hazards, the employer's ordinary duty to furnish a safe place to work, unless perhaps in cases where the perils are obvious or his own action creates them. If not, no such obligation exists unless it rests upon the owner of the ship. Moreover, his ability to distribute the loss over the industry is not lessened by the fact that the men who do the work are employed and furnished by another. Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew. • • • *That the owner seeks to have it done with the advantages of more modern divisions of labor does not minimize the worker's hazard and should not nullify his protection.*" (Italics ours.)

The test relating to "ship's work" set forth in the *Sieracki* and reaffirmed in the *Hawn* case has been broadly interpreted.

The work done by the deceased in this case was traditionally "seaman's work." In any modern vessel an electrician or an engineer with knowledge of electricity is a vital part of a ship's crew. In *La Dage, Merchant Ships* (Cornell Maritime Press 1955) at page 344, the author in describing the Engineering Department on a vessel states:

"• • • In the absence of an electrician on the staff, the Third Assistant usually takes care of electrical

maintenance. * * * On larger ships, Junior Engineers may be employed to act as assistant watch engineers. During repairs they assist where needed. * * *

Depending upon the size of ship, many additional personnel may be required including a Chief Electrician and assistant electricians, * * *

There appears in *Proceedings of The Merchant Marine Council, United States Coast Guard* Vol. 12, April 1955, No. 4 at page 61 an article entitled "Safety and Maintenance of Electrical Equipment." The article stresses that on every ship, "a routine inspection and maintenance program be set up for the proper care of electrical machinery because of frequent changes in the crew who care for and operate this equipment." Among other things the article states at page 62:

"There are various solvents used for cleaning insulation and windings of electrical machinery of oily and greasy deposits. Carbon tetrachloride and stoddard solvent, or a combination of the two, are frequently used for this purpose. Gasoline or benzine should never be used for cleaning purposes on shipboard, because of the great fire hazard involved. While stoddard solvent is a petroleum product it is utilized because of its high flash point.

Care must be exercised when using carbon tetrachloride because of its toxic effects. Persons working with this material must avoid breathing the fumes. For this reason the area where the cleaning is taking place should be well ventilated."

The use of electrical equipment on board a vessel is of comparatively recent origin. However, the electrician on board a modern vessel serves as important a function in the ability of the vessel to navigate as any other member of a vessel's crew. The agreement between the National Maritime Union of America and various companies and agents in Atlantic and Gulf Coast Ports of June 16, 1956

lists the following specific unlicensed personnel classifications under the agreement: "Electricians," "Watch Electricians," "Day Electricians," "Second Electrician," "Deck Electrician," "Maintenance Electricians." This illustrates the fallacy in the contention of the defendant that the work of the decedent was not work "traditionally performed by seamen." Modern vessels are large and complex mechanisms. Even those vessels that are not electric motor ships use large quantities of electrical equipment for lighting, auxiliary power, and other functions on a vessel. Obviously, whatever their designation, each such vessel must have one or more members of the crew who are trained to inspect, clean, and maintain electrical equipment on board. The fact that the owner may seek to have certain types of maintenance work done by a contractor employee and "seeks to have it done with the advantages of more modern divisions of labor" to use Mr. Justice Rutledge's words, "does not minimize the hazard and should not nullify his protection." *Seas Shipping Co. v. Sieracki, supra*.

The test based on analogy of work was applied in *Pinion v. Mississippi Shipping Co.*, 156 F. Supp. 652 (E. D. La. 1957). In that case the libellant, a plumber-machinist, employed by an independent contractor was injured while on a scaffold replacing some salt water pipe on the vessel. The court held that the scaffolding used, whether furnished by libellant's employer or by the vessel, rendered the vessel unseaworthy and allowed recovery. Judge Wright rejected the view that the work of the libellant did not entitle him to a seaworthy vessel because it did not involve loading equipment as in the *Hawn* case. He stated at page 657:

" * * *. The short answer to this argument is that the *S.S. Del Mar* herself regularly carries a plumber-machinist as a member of her crew. And a plumber-machinist is precisely the type of seaman qualified to repair or replace short lengths of one-inch pipe.

If warranty of seaworthiness applies to landmen aboard a vessel performing work historically performed by seamen, it should certainly be applied to landmen aboard performing work currently performed by seamen."

The peculiarities of maritime conditions apply to electricians as well as to other members of the crew. It is the requirement of working in confined places and in the peculiar conditions caused by the limitations of space, machinery, and structure, inherent in the design of a vessel that creates special risks.

This point was raised by the defendant's attorney when he cross-examined Mr. Doidge (R. 97):

"Q. Had you, for example, used carbon tetrachloride for cleaning generators in a factory, perhaps?

.

A. When you come right down to it, there is a lot of difference between doing it in an engine room and doing it in a factory, doing it in an engine room on a ship.

Q. Had you ever used it in a factory anywhere on shore before this occasion? A. That I don't know for sure. I don't know for sure.

Q. Do you think it is likely that you did, though? A. It is possible, yes.

Q. And in such a place, wherever it may be, a factory or a building, would they customarily be equipped with any sort of overhead blowers or ventilation system built into the building? A. There is no comparison, sir, between the two."

On the redirect this testimony was amplified (R. 103):

"Q. You were talking about the difference with a factory job. What is the difference between work in the factory and work in this low engine room in this ship? A. Well, usually in a factory or in a place of

business like that, you have much more air space. You have windows all around you and you have higher ceiling space. Q. . .

Q. It is not confined like in the engine room? A. That's true, there is no comparison.

Q. Was this a confined area, this engine room? A. Well, definitely."

The deceased was entitled to a warranty of seaworthiness because he was engaged in "ship's work." Basically the cleaning of electrical equipment is the type of routine maintenance work which could be performed by any member of the crew who had qualifications as an electrician.

In spite of the language of this court in the *Seracki* case and in the *Hawn* case, the Solicitor General in the brief *amicus curiae* filed herein urges that the test for unseaworthiness is not in comparing the work being done to work done by seamen. The Solicitor General, apparently wishes to turn the clock back and establish a test of "coming and going" to or from a specific voyage for the rule of unseaworthiness. He cites *Despar v. Starved Rock Ferry Co.*, 342 U. S. 187, 72 S. Ct. 216, 96 L. Ed. 205 (1951). This case involved a definition of the word "seaman" as used in the Jones Act and did not involve any question of unseaworthiness. In this connection Mr. Justice Jackson stated at page 190 with reference to the facts of that case:

" * * * . The boats were not afloat and had neither captain or crew. * * * "

In the present case the vessel was afloat (R. 133). There was a captain and crew on board during the time the vessel was tied up (R. 124). Can the Solicitor General seriously contend in the present case that if one of the members of the ship's engine department had been injured while the vessel was tied up, he would not be covered under the Jones Act or have a claim for unseaworthiness because

of the *Despar* decision? To frame the question, is to answer it. See *Oakes v. Graham Towing Co.*, 135 F. Supp. 485 (D. C. Pa. 1955).

Among the other cases cited by the Solicitor General, the case of *Berryhill v. Pacific Far East Line*, 238 F. 2d 385 (9 Cir. 1957) affirming 138 F. Supp. 859 (D. C. Cal. 1955) cert. den. 354 U. S. 938, 77 S. Ct. 1400, L. Ed. (1957) involved major repairs on a dry-docked vessel. In *Raidy v. United States*, 252 F. 2d 117 (4 Cir. 1958) cert. den. 356 U. S. 973, 78 S. Ct. 1136, L. Ed. — (1958) the vessel was also in drydock for structural changes. The case of *Union Carbide Corporation v. Goett*, 256 F. 2d 449 (4 Cir. 1958) the vessel was in dry dock for structural changes and the crew had been discharged. In each of these cases the outstanding feature was the fact that the vessels were in drydock for repairs of a major nature. In the present case the vessel remained afloat. The repairs were not of such a substantial nature as to require drydocking.

The defendant's vessel was getting its "annual overhaul" at the time of the accident. The defendant's witness, Walter C. Thompson, characterized the "annual overhaul or the annual repairs" (R. 133):

"A. Well it consists of painting the boat, making *minor* repairs, changing the lines, working on the engine room, and so forth." (Italics ours.)

The vessel was in navigable waters (R. 80).

The vessel had remained in the water at Rodermond Industries for about three weeks (R. 3; R. 80). The captain of the vessel was on board the vessel every day (R. 123). In addition there were four or five deck men on board and the full complement of engineers and engine room crew on board (R. 124). Some men slept on board the vessel (R. 125). According to the specifications prepared by the vessel the ship's crew were to "remove and replace the 8

cylinder heads" on the very generators the deceased cleaned (R. 146). The crew worked during the "annual overhaul" alongside of the contractors and the work was done under the orders and supervision of defendant's Captain, Chief Engineer and Marine Superintendent (R. 75; R. 76; R. 123 through R. 130).

The vessel on which the deceased was injured was not withdrawn from navigation in any sense of the word. It is true that the vessel's generators were not in operation, but power was substituted from the shore and was used through "the main board of the ship" (R. 7). The vessel's ventilating system did work and was in operation (R. 8). The power that came from the shore was used to operate "the vessel's own equipment" (R. 13). In view of the work that was being done the owners of the vessel apparently found it more efficient and perhaps less expensive to use power from shore rather than use ship's personnel to operate the vessel's auxiliary power sources. This however, did not remove the vessel from navigation. It still had a captain and crew who still performed duties on board the vessel. It was not undergoing such drastic repairs as to change the character of the vessel. It was going through an annual maintenance operation designed to prepare the vessel for its next voyages.

The case of *Berge v. National Bulk Carriers*, 251 F. 2d 717 (2 Cir. 1958) involved the virtual rebuilding of the interior of a vessel. Judge Learned Hand who wrote the *Berge* opinion, which was argued a day after *Halecki* and was decided the same day, specifically called attention to the difference in result in the two cases. He stated at page 718:

" . . . , the answer depends upon whether the work on which the plaintiff was engaged was of a kind that the crew of a vessel was accustomed to perform. . . . "

The same distinction was recognized in another case relied on by the Solicitor General. The case of *West v. United States*, — F. 2d — (3 Cir. 1958) involved a "moth ball" vessel. She had no crew on board and was being rehabilitated for service (S. G. br. p. 26). Judge Goodrich in his opinion distinguished the *West* case from a prior decision of that Court of Appeals, *Read v. United States*, 201 F. 2d 758 (3 Cir. 1952). He stated that the *Read* case, which found unseaworthiness in favor of the employee of a subcontractor:

" * * * is distinguishable, from the instant case at least, on the amount of work involved."

In addition to the *Read* case, other non-longshoremen, non-crewmen cases allowing recovery for unseaworthiness are: *Amerocean Steamship Company v. Copp*, 245 F. 2d 291 (9 Cir. 1957) where the employee of an independent contractor who was dismantling grain fittings, removing charterer's property and refurbishing a ship was held to be entitled to a seaworthy vessel; *Torres v. The Kastor*, 227 F. 2d 664 (2 Cir. 1955) where it was held that a workman employed by an independent contractor engaged in cleaning loose pitch from a vessel was entitled to a seaworthy vessel; *Pioneer Steamship Company v. Hill*, 227 F. 2d 262 (6 Cir. 1955) where it was stated that a shipfitter's helper employed by a contractor who was making repairs to a vessel during its winter layup was "probably within the broadened class of workers" to whom a duty to provide a seaworthy vessel was owed; *Crawford v. Pope & Talbot, Inc.*, 206 F. 2d 784 (3 Cir. 1953) where a duty of seaworthiness was held to be owed to employees of a contractor hired "to clean the accumulated rust and dirt from the four deep tanks."

The cases in the various Courts of Appeal seem to have developed a line of distinction. They have denied recovery

for unseaworthiness where the vessel had no crew on board or the vessel was in drydock or both conditions existed, and where in addition, the repairs on the vessel were of a substantial nature and involved either a major rebuilding or replacing of large parts of the vessel or a basic alteration of the structure and character of the vessel itself. There are reasons why, as a matter of policy the doctrine of seaworthiness should extend even to such vessels. However, this court need not consider the broader application of the doctrine of seaworthiness to sustain the courts below in this case because none of these distinguishing factors are present. The vessel in this case was in navigable waters. It had a captain and crew working on it during the time it was tied up. The work done was basically maintenance work rather than major repairs or alterations, and it was work that could have been done by members of a ship's crew who had qualifications as electricians. Under the circumstances, the deceased, at the time he was injured, had a right to a seaworthy vessel.

(b) *The Wrongful Death Act of the State of New Jersey, N. J. S. A. 2A:31-1 et seq., permits recovery for such "wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages * * **

It has been held that the maritime law will enforce a cause of action for death based on negligence applying the New Jersey Wrongful Death Act. *Gill v. United States*, 184 F. 2d 49 (2 Cir. 1950). The maritime law will enforce a cause of action for death based on unseaworthiness applying the New Jersey Wrongful Death Act.

This accident happened aboard a vessel docked at Jersey City, New Jersey [R. 80] and therefore the Wrongful Death Act of the State of New Jersey is applicable.

The action for death in the case at issue was based on two distinct grounds of recovery: (1) for negligence, and (2) for unseaworthiness.

N. J. S. A. 2A:31-1 sets forth the following test of liability:

*"When the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury, the person who would have been liable in damages for the injury if death had not ensued shall be liable in an action for damages. * * **" (Italics ours.)

There are two key phrases in the part of the statute quoted above. The first is the phrase "wrongful act, neglect or default." The other is the descriptive phrase "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages."

First we discuss the "such as" phrase which directly indicates that the "wrongful act, neglect or default" which it describes has the same scope as the "wrongful act, neglect or default" which would give rise to an action by the deceased himself for personal injuries if he had lived. It is stated in relative terms and it avoids fixing the basis of liability as that existing at the time the statute was enacted. It permits the concepts of liability to develop with the rights of the individual. This is not the kind of statute that requires amendment with every new development in the substantive law of liability for personal injuries. It is rather an act designed to provide for dependents described in the act the same basis of liability as the individual has. It provides for neither more nor less. While the measure of damages may differ in the case of dependents, the basis of liability is coextensive in both wrongful death and personal liability cases. The "such as"

clause establishes that the legislature did not intend it to be otherwise. Since the accident happened on navigable waters, the liability of the defendant to the deceased would be determined by the maritime law.

In the case of *Paulmier v. The Erie R. R. Co.*, 34 N. J. L. 151 (Sup. Ct. 1870) Chief Justice Beasley had commented at page 157:

“ * * * It seems to me that the literal language of the statute is to be followed, that is, a right of action exists in all cases in which such right would have existed in the party injured if death had not ensued, * * * ”

The referral nature of the statute was recognized in the case of *Coulter v. New Jersey Pulverizing Co.*, 11 N. J. Misc. 5, 163 A. 661 (Supr. Ct. 1932). The plaintiffs had brought an action under the New Jersey Wrongful Death Act where the Statute of Limitation had barred the claim of the deceased before death. The action was dismissed on motion. After quoting the statute Justice Bodine stated at page 661:

“ It is, of course, arguable that, since the actions are separate, the only bar to the action under the Death Act is the bar contained in the act itself. *But the statute only gives an action if the decedent had one.* In the present cases, the decedents' actions were lost by lapse of time. Since the decedents had no cause of action, their representatives had none. * * * ” (Italics ours.)

It would be an unjust result and a harsh construction to interpret the statute with respect to some given basis of liability to say that the deceased, if he had lived and were totally disabled as a result of an injury, could receive (in addition to other elements of damage) his past and future loss of earnings; while if he died, his widow and infant children whose lives and happiness depend in large part on such earning power would be left remediless

and in many cases penniless. It would thwart the obvious policy of the wrongful death act and certainly would not give the act the liberal construction intended.

In *Haggerty v. Central Railroad Co.*, 31 N. J. L. 349 (Supr. Ct. 1865), Chief Justice Beasley had stated in connection with the interpretation of this act at page 350:

“ * * * The design of the act cannot be mistaken. It is entirely and in the highest sense remedial in its nature. Its object was to abolish the harsh and technical rule of the common law-actio personalis moritur cum persona. The rule had nothing but prescriptive authority to support it; it was a defect in the law, and this statute was designed to remove that defect. It is, therefore, entitled to receive the liberal construction which appertains to remedial statutes.”

The remedial nature of the statute was recognized again in *Murphy v. Board of Chosen Freeholders of Mercer County*, 57 N. J. L. 245, 31 A. 229 (Supr. Ct. 1894). It was claimed that the word “corporation” used in the New Jersey Wrongful Death Act was not broad enough to permit actions to be instituted under the act against public, municipal, or quasi-municipal corporations. This argument was rejected by the court, Judge Lippincott stating at page 231 of Atlantic:

“ * * * In the construction of a remedial statute, the rule is to avoid all subtle inventions and evasions for the continuance of the remedy, et pro privato commodo. The duty of the court is to add force and life to the cure and remedy, according to the true intent of the maker of the act, pro bono publico. * * * ”

See also *Hartman v. City of Brigantine*, 42 N. J. Super. 247, 126 A. 2d 224 (App. Div. 1956), aff'd 23 N. J. 530, 129 A. 2d 876 (1957); *Turon v. J & L Const. Co.*, 8 N. J. 543, 86 A. 2d 192 (1952); *Cetofonte v. Camden Coke Co.*,

78 N. J. L. 662, 75 A. 913 (1910); *Carianni v. Schwenker*, 38 N. J. Super. 350, 118 A. 2d 847 (App. Div. 1955).

In this case, the deceased would have had two causes of action for personal injuries: (1) for negligence (2) for unseaworthiness. The intention of the legislature was in the event of his death, to give his dependents the same causes of action which he would have had, if death had not ensued. It follows that the legislative intent was to give to the dependents of the deceased both causes of action (1) for negligence and (2) for unseaworthiness which he would have had if he lived.

Keeping in mind the remedial nature of the statute we now consider the meaning of the phrase "wrongful act, neglect or default." If the phrase were intended to be confined to acts of "negligence" the words "wrongful act" and "default" are unnecessary. In construing a statute, courts do not readily assume that words in a statute are superfluous. Both the words "wrongful act" and "default" in their natural meaning connote something much broader than mere negligence. Negligence in a legal sense is always a "wrongful act" and is sometimes the result of a "default." However not all "defaults" constitute negligence, nor do all wrongful acts fall within that classification.

The construction of these words were an issue in the case of *Oroz v. American President Lines, Ltd.*, 154 F. Supp. 241 (S. D. N. Y. 1957). In that case Judge Walsh held "unseaworthiness" to come within the scope of this phrase as used in the New Jersey Statute of Limitations. Judge Walsh stated at page 243:

"The next question is whether the analogous New Jersey Statute of limitations had run. That statute is N.J.S. 2A:14-2, and it reads as follows:

"Every action at law for an injury to the person caused by the *wrongful act, neglect or default* of any person within this state shall be commenced within

2 years next after the cause of any such action shall have accrued.'

The New Jersey courts have held this statute to be applicable to all claims for personal injury whether based upon tort or contract. In *Burns v. Bethlehem Steel Co.*, 20 N. J. 37, 118 A. (2d) 544, a rigger employed in defendant's shipyard, sued for personal injuries claiming to be a third-party beneficiary of a contract between his union and the defendant, which he alleged was breached by failure to provide certain safety devices. The court held that the two-year statute was applicable, rather than the six-year statute provided for contract claims. In so holding it followed *Weinstein v. Blanchard, E. & A.*, 109 N. J. L. 332, 162 A. 601, a case in which a patient claimed for injuries caused by the malpractice of a physician alleging a breach of the contractual relationship with the physician. Although the *Weinstein* case was decided under an earlier statute which was different in form, the *Burns* case held that the changes in the statute were merely as to form, not substance; that there was no evidence of a legislative intent to change the rule of the *Weinstein* case. The *Weinstein* case was also followed in *Martucci v. Koppers Co.* (D. C. N. J.), 58 F. Supp. 707.

It is, therefore, my conclusion that plaintiff's action would be barred in the New Jersey courts, and consequently that it would also be barred in New York courts.

Liability for unseaworthiness is not based upon fault. . . . The employer's breach of his obligation has been characterized as a tort which arises out of the maritime status or relation. . . . Its original derivation may be lost in the past. *Yet there can be no question, regardless of the nature of the shipowner's obligation, that this is a claim for personal injury based upon its alleged wrongful failure to perform its obligation. Accordingly, in New Jersey the claim would be governed by the two-year statute of limitations.*" (Italics ours.)

This decision was very recently affirmed [*#208* Oct. Term, Decided Sept. 30, 1958, 2 Cir.], citing both *Halecki* and *Skovgaard*.

Judson v. Peoples Bank & Trust Company of Westfield, 17 N. J. 67, 110 A. 2d 24 (1954) was an action based on an alleged fraudulent conspiracy to oust plaintiffs from control of a bank. Among other things the case involved the application of the New Jersey Joint Tortfeasor's Contribution Law, N. J. S. A. 2A:53a-1 which used the phrase "wrongful act, neglect or default of joint tortfeasors." It was conceded on argument that the term "wrongful act" is most broad and comprehensive. In its opinion the court cited *Louis Schlesinger Co. v. Rice*, 4 N. J. 169, 72 A. 2d 197 (1950) and defined the term as "any act which in the ordinary course will infringe upon the rights of another to his damage, except it be done in the exercise of an equal or superior right." In the course of his opinion Mr. Justice Brennan referred to the fact that the same language appears in the Wrongful Death Act. He stated at page 35 of *Atlantic*:

" * * * And the statute creating a right of action for death by wrongful act, N. J. S. 2A:31-1 et seq., N. J. S. A., gives the right whenever 'the death of a person is caused by a wrongful act, neglect or default, such as would, if death had not ensued, have entitled the person injured to maintain an action for damages resulting from the injury.' We are aware of no authority in this State which has suggested a limitation of the right of action under that statute to cases of death resulting from negligence. The statute was adopted from England, and 23 Halsbury's Laws of England (2d Ed. 1936), p. 691, is authority that 'this term includes direct acts of trespass to the person, as well as criminal acts of violence.' * * * "

Mr. Justice Brennan then concluded as to the role of the phrase "wrongful act, neglect or default" in the Joint Tortfeasor's Act at page 36:

" * * * The more reasonable interpretation is that the expression was included to fortify the intended

comprehensiveness of sections 1 and 2 taken from the draft of uniform act and leave no doubt that all torts of commission and omission were within the ambit of the law."

The phrase "wrongful act, neglect or default" has been construed to include an action based on a breach of warranty of fitness for use under the New York Statute. In *Greco v. Kresge*, 277 N. Y. 26, 12 N. E. 2d 557 (1938) the plaintiff's wife died as a result of eating infected pork frankfurters purchased from the defendant. The plaintiff's cause of action for negligence was dismissed by consent. The motion to dismiss the cause of action based on a breach of warranty was denied. Justice Rippey speaking for the New York Court of Appeals posed the issue at page 31:

" * * * The inquiry here is whether the breach of the implied warranty as alleged in the complaint, negligence being disclaimed, was a 'wrongful act, neglect or default' within the meaning of the statute. * * * "

After considerable discussion of the history and nature of the wrongful death acts, he stated at page 34:

" * * * At times the same facts may warrant procedure ex contractu or ex delicto. At such times recovery is not conditioned on definition nor measured by a determination of whether it is grounded in a violation of a duty owing to another or in a breach of a contractual obligation. * * * Violation of a duty owing to another is a wrongful act; breach of a contract involving violation of duty may be likewise a wrongful act. Here the duty rested on defendant to see, at its peril, that the food was fit for human consumption and it is based on considerations of public health and public policy. * * * Though the action may be brought solely for the breach of the implied warranty, the breach is a wrongful act, a default and, in its essential nature, a tort. * * * "

"We conclude that the breach of the warranty in a case such as this was a 'default' or 'wrongful act' within the meaning of those terms as used in the statute not only as a matter of definition but within the clear legislative intent. . . .

" Apropos are the words of Judge Cardozo in the closing paragraph of his opinion in *Van Beeck v. Sabine Towing Co.* . . . where he refers to the construction to be given death statutes. 'Death statutes,' he writes, have their roots in dissatisfaction with the archaisms of the law which have been traced to their origin in the course of this opinion. It would be a misfortune if a narrow of grudging process of construction were to exemplify and perpetuate the very evils to be remedied. . . . There are times when uncertain words are to be wrought into consistency and unity with a legislative policy which is itself a source or law, a new generative impulse transmitted to the legal system. . . . "

Cf. also Sullivan v. Dunham, 161 N. Y. 290, 55 N. E. 923 (1900); *Greenwood v. John R. Thompson*, 213 Ill. App. 371 (1919); *Roche v. St. John's Riverside Hospital*, '96 Misc. 289, 160 N. Y. S. 401 (1916) aff'd 161 N. Y. S. 1143 (App. Div. 1916); *Grein v. Imperial Airways Ltd.*, 1 K. B. 30; (1936) 2 All. E. R. 1258; C. A.; *Jackson v. Watson & Sons*, 2 K. B. 193 (1909); *The H. S. Inc. No. 72*, 130 F. 2d 341 (3 Cir. 1942).

There is every reason in logic and in justice to consider unseaworthiness a maritime tort which is a "wrongful act, neglect or default." In *Seas Shipping Co. v. Sieracki*, 149 F. 2d 98 (3 Cir. 1945) Judge Goodrich after pointing out that so far as "warranty" depended on contract, a stevedore was not a party to a contract, he concluded at page 101:

" And so an injury to a stevedore comes within the classification of a marine tort. . . . "

The United States Supreme Court in the same case in 328 U. S. 85; 66 S. Ct. 872, 90 L. Ed. 1099 (1946), Mr. Justice Rutledge speaking, stated at page 877:

" * * * It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character. * * * *Carlisle Packing Co. v. Sandanger*, supra, it is a form of absolute duty owing to all within the range of its humanitarian policy."

In the case of *Troupe v. Chicago D. & G. Bay Transit Co.*, 234 F. 2d 253. (2 Cir. 1956), Judge Waterman considered the various theories on which a federal court, sitting on the civil side, could have jurisdiction of an action based on unseaworthiness where an action for negligence under the Jones Act is also pleaded. In considering "pendent jurisdiction" as a ground he reviewed the nature of the two theories of recovery. He stated at page 258:

" * * * The Jones Act claim for negligence and the maritime claim for unseaworthiness provide seamen with two different grounds of relief for the commission of the same wrong. A judgment on one claim bars a second suit based on the other claim. * * * Since both claims are based on the same operative facts, they constitute a single 'cause of action.' * * * Because of the *extremely close relation* of the two claims, and the virtual identity of their factual components, it is arguable that a federal district court, having properly taken jurisdiction at law under the Jones Act over the negligence claim, has jurisdiction at law over the closely related unseaworthiness claim. * * * "

In view of the "close relation" of causes of action based on negligence and unseaworthiness it is difficult to conceive why the broad "wrongful act, neglect or default" classification does not apply to both. See also the comment of Judge

Learned Hand in *Gill v. United States*, 184 F. 2d 49, 57 (2 Cir. 1950).

Unseaworthiness falls within the broad classifications of "wrongful acts" or "defaults" if not "neglects." There is no reason to suppose that the legislature, while using referral language, intended to exclude "unseaworthiness" from the New Jersey Wrongful Death Act whenever it would otherwise apply. The broad language of the statute indicates a contrary intent. The liberal construction to which the statute is entitled also compels a contrary result. It certainly is not just, to deprive dependents of a right to recovery which the deceased himself would have had if he had lived, if the basis of liability is unseaworthiness, but to permit recovery where the basis is negligence.

The petitioner places weight on *Moran v. Moore McCormack Lines*, 131 N. J. L. 332, 36 A. 2d 415 (Sup. Ct. 1944) and *Santa-Maria v. Lamport & Holt Line, Ltd.*, 119 N. J. L. 467, 196 A. 706 (E. & A. 1938) saying that "in these cases the New Jersey courts have, with reference to the Wrongful Death Act consistently confined its application to negligence situations" (P. br., 15, 42). In the *Santamaria* case *supra* the plaintiff had won on the theory of negligence for the death of a worker who had been unloading a vessel. There was no need for the widow to argue or for the court to consider any issue except whether to sustain the verdict based on negligence. The court affirmed the verdict for plaintiff. It is interesting to note that the court cited two federal court decisions for the proposition that the owner of the vessel owed the employee of a consignee a safe place to work. The *Moran supra* case did not involve a death action at all. The plaintiff's case was tried on a theory of negligence, the Supreme Court of New Jersey, then an intermediate court of appeal, affirmed a non-suit holding that the plaintiff stevedore had failed to prove negligence.

In neither case was the doctrine of unseaworthiness urged upon or discussed by the appellate courts. It must be remembered that it was not until 2 years after the last decision that this court decided that a longshoreman was entitled to a seaworthy vessel. *Seas Shipping v. Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946). Therefore no valid conclusion can be drawn from the lack of discussion of unseaworthiness in either state-court case.

Two Courts of Appeal have accepted the respondents' construction of the New Jersey Wrongful Death Act. They construed it remedial, referral in nature as to liability, and broad enough to include an action based on unseaworthiness as well as negligence. This construction is supported by the decisions of the New Jersey courts.

Not only was the deceased entitled to have a seaworthy vessel at the time of his injury on petitioner's vessel, but the widow and children of the deceased are entitled to sue under the New Jersey Wrongful Death Act for a breach of the duty to supply a seaworthy vessel where such breach of duty resulted in death.

POINT II

The duty of the vessel to provide the deceased with a seaworthy vessel and appliances was absolute and non-delegable.

Where a shipowner owes a duty to provide a seaworthy vessel to a seaman or other worker on his vessel, it is well established that his duty is absolute and non-delegable. *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 (1946); *Petterson v. Alaska S.S. Co.*, 205 F. 2d 478 (9 Cir. 1953), aff'd *per curiam* 347 U. S. 396, 74 S. Ct. 601, 98 L. Ed. 798 (1954); *Yanow v. Weyerhaeuser Steamship Co.*, 250 F. 2d 74 (9 Cir. 1958); *Sprague v.*

The Texas Co., 250 F. 2d 123 (2 Cir. 1957); *Klimaszewski v. Pacific-Atlantic Steamship Co.*, 246 F. 2d 875 (3 Cir. 1957); *Johnson Line v. Maloney*, 243 F. 2d 293 (9 Cir. 1957); *Grillea v. United States*, 232 F. 2d 919 (2 Cir. 1956); *McFall v. Compagnie Maritime Belge*, 304 N. Y. 314, 107 N. E. 2d 463 (1952).

In the case of *Amador v. A/S J. Ludwig Mowinckels Rederi*, 224 F. 2d 437 (2 Cir. 1955), cert. den. 350 U. S. 901, 76 S. Ct. 179, 100 L. Ed. 791 (1955), a stevedore was injured by wire coils being discharged. It appeared that if the cargo had been discharged in one sequence there was no danger but if discharged in another order it was dangerous. In holding the ship liable for an unseaworthy condition, Judge Learned Hand stated at page 440:

"We read *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, 66 S. Ct. 872, 90 L. Ed. 1099 as definitely laying it down that longshoremen discharging a ship are in the same position vis-a-vis the ship as members of her crew; * * * The stowage was therefore only conditionally proper, and we do not see how the ship can escape liability when she allowed a stow, only conditionally proper, to be discharged without fulfillment of the condition. * * * Under *Seas Shipping Co. v. Sieracki*, supra, the longshoremen as, pro hac vice members of the crew, were exposed to the dangers of a negligent stow as long as the condition remained unfulfilled. What Lunde did was indeed quite natural in view of the contract between the ship and the longshoremen's contract; but it did not fulfill the condition. Unless we have misunderstood the doctrine, the situation as to the ship's liability is precisely as though the crew had been discharging the strips, and Lunde had not seen to it that the discharge of the strips at the earlier port had not been made in accordance with what its position in the stow demanded if its discharge was to be safe."

The condition of the ship's ventilating system in the present case was such that, although seaworthy for ordinary ventilation, it was unfit and unsafe for the use to which it was put, when, pursuant to the directions of the marine superintendent of the defendant, carbon tetrachloride was used in the confined spaces of the vessel's engine room.

As stated in the *Amador* case, the deceased was in the same position vis-a-vis the ship as members of her crew. The defendant's orders for the use of carbon tetrachloride, which they knew was a dangerous chemical in confined spaces, was improper unless the defendant furnished adequate ventilation to remove harmful fumes. This was a condition to be fulfilled by the defendant. Ordering the use of carbon tetrachloride in the confined area of the engine room without the fulfillment of the condition resulted in an unsafe and unseaworthy condition for which the jury found the defendant liable.

The failure of defendant to furnish adequate ventilating appliances created the unsafe and unseaworthy condition. The ventilating system was supplied by the vessel. The auxiliary blower was supplied by Rodermond. This equipment was inadequate for the purpose intended, namely spray cleaning with carbon tetrachloride, ordered by the defendant. The doctrine of unseaworthiness includes the failure to supply proper appliances.

POINT III

The duty of the vessel to provide the deceased with a safe place to work and to exercise due care for his safety was continuing and non-delegable.

The defendant does not dispute the right of the plaintiff to bring an action based on negligence. The right to recover on this ground, applying the New Jersey Wrongful Death Act, is established. *Gill v. United States*, 184 F. 2d 49 (2 Cir. 1950). The deceased occupied the status of a business invitee aboard the vessel. As such the defendant owed to him the duty to provide a safe place to work. This duty was continuous and non-delegable.

There was ample evidence that the vessel was an unsafe place for the deceased to work. Since the duty of the vessel was non-delegable and persisted regardless of any concurrent duty on the part of the deceased's employer or of Rodermond, the jury was amply justified in finding the defendant negligent. This is emphasized by the fact that the defendant specifically directed the use of a dangerous chemical as a cleaning agent.

It has been held by this Court in *Puleo v. H. E. Moss*, 159 F. 2d 842 (2 Cir. 1947) that the measure of care owed to a business invitee is the same as that owed by employer to his employee. The extent of this duty was discussed by Judge Learned Hand in the case of *Guerrini v. United States*, 167 F. 2d 352 (2 Cir. 1948) where he held that a failure to take affirmative steps to provide for the business guest's safety is a breach of duty. Cf. *Meny v. Carlson*, 6 N. J. 82, 77 A. 2d 245 (1950).

In the case of *Anderson v. Lorentzen*, 160 F. 2d 173 (2 Cir. 1947), the plaintiffs, longshoremen, were injured when they came into contact with cashew nut oil which caused a

dermatitis. Plaintiffs' employer knew of the danger and had a special cream on the dock for the use of the plaintiffs. Among other things, Judge Chase stated at page 174:

" * * * Apparently the plaintiffs were not told to use it and, in any event, neither of the defendants supplied anything of the sort or warned the plaintiffs of the danger.

The defendants-appellants have argued that, since the employer of the stevedores who unloaded the liquid was aware of the danger, they were under no duty to warn those who worked for that independent contractor. We cannot agree. The defendants-appellants not only owed the duty to provide a seaworthy ship on which these stevedores who unloaded the cargo might work, *Seas Shipping Co. Inc. v. Sieracki*, 328 U. S. 85, 66 S. Ct. 872, but they owed them, as invitees, or business visitors, the duty to provide a reasonably safe place to do their work. *Fodera v. Booth American Shipping Corp.*, 2 Cir., 159 F. 2d 795. This duty was non-delegable and persisted despite any concurrent duty on the part of the stevedoring company. * * *

In the case of *Gunnarson v. Robert Jacobs Inc.*, 94 F. 2d 170 (2 Cir. 1938) cert. den. 303 U. S. 660, 58 S. Ct. 764, 82 L. Ed. 1119 (1938) the accident involved an explosion of propane gas shipped in a tank on a yacht and used for cooking purposes. In reversing a decree which had been rendered against the widow for the death of her husband, a captain of the vessel. Among other things, Judge Learned Hand stated at page 172:

" * * * It is of no moment that it was harmless so long as it did not leak, and that it would not leak if it was properly handled. In such cases liability depends upon an equation in which the gravity of the harm, if it comes, multiplied into the chance of its occurrence, must be weighted against the expense, inconvenience and loss of providing against it. The harm may be so great as to impose an absolute liability regardless

of any negligence; in such cases the very activity, though lawful, entails responsibility, and reparation becomes a cost of the enterprise, as under workmen's compensation. * * *

The great danger involved in using carbon tetrachloride was admitted by all witnesses. The jury had ample evidence which warranted a finding that the defendant was fully aware of the danger involved. It is to be noted that none of the ventilation or blower equipment used belonged to the deceased's employer.

In the case of *Hoff v. United States*, 87 F. Supp. 909 (D. C. Wash. 1949), a seaman was injured while spraying paint on board a vessel. In finding for libelant, Judge Bowen stated at page 911:

"The evidence and a preponderance thereof received in this case requires the Court to and the Court does therefrom find, conclude and decide that the vessel was for the purpose of carrying on this spray painting work in the engineroom inadequately and improperly ventilated, resulting in a negligent and unsafe condition in and about the ship at the place and time when the libelant and his fellow seamen were doing the spray painting work, and that as a proximate result thereof the libelant and others of his fellow seamen were caused to cough and to experience difficulty in their breathing and irritation and injury to the membranous lining of their lungs. * * *

The preponderance of the evidence in this case convinces the Court that spray painting was not customarily done upon Liberty ships, that it had been done on some ships only when there was forced ventilation such as was produced by ventilating machines on board the vessel, and that there were no such ventilating machines on the Bloomquist on which libelant was working when he was injured. Respondent was thus negligent in not providing suitable ventilation in the

engineroom while libelant was spray painting there."
(Italics ours.)

In the case of *Weyerhaeuser Steamship Co. v. Nacirema Operating Co.*, 355 U.S. 563, 78 S.Ct. 438, — L. Ed. — (1958) which involved an action for indemnity between a vessel and stevedoring company, Mr. Justice Clark commented on the basis of the original suit by a longshoreman injured when a piece of wood from a temporary winch shelter hit him. He recognized that in the original negligence action, "The test of liability was based on failure to perform a non-delegable duty."

The evidence supporting the findings of the jury are discussed elsewhere in this brief. The cases establish that the duty owed was non-delegable. The defendant directed the use of a chemical in a confined space which was highly dangerous to human life if proper ventilation were not provided. The defendant knew or should have known that the ship's ventilation system and the auxiliary blower furnished by Rodermond were inadequate. Its failure to furnish adequate ventilating equipment or require the contractor to furnish it, constituted a breach of its duty. The very dangerous qualities of the chemical to human life when used in confined areas imposed a duty on defendant commensurate with the danger. This duty defendant failed to perform.

POINT IV

The rule of comparative negligence was properly applied in the present action.)

The attorney for the petitioners conceded that the general maritime law applied in this case. He had stated (R. 80):

"The Court: Mr. Mahoney, is there any question but what this vessel was in navigable waters?"

(58) Mr. Mahoney: I think not, sir.

Mr. Baker: All right.

The Court: And you agree that the general maritime law prevails?

Mr. Mahoney: There is no issue there, sir.

Mr. Baker: All right."

Now, on appeal, they take a contrary position and claim that the general maritime law does not apply:

We note that the New Jersey Wrongful Death Act, N. J. S. A. 2A:31-1 *et seq.* does not anywhere state that contributory negligence is a defense to an action under the act. Cf. *The Devona*, 1 F. 2d 482, 484 (D. C. Me. 1924). The substantive law relating to liability is incorporated by reference and is coextensive with the substantive law of liability for personal injury as distinguished from wrongful death.

It is not questioned that in common-law actions arising under the New Jersey Wrongful Death Act, common-law defenses are applied. The act itself measures liability by the test of whether or not the deceased, if death had not ensued, would have been able to maintain an action. Obviously in a common-law action, which is what is involved in all the New Jersey decisions cited by defendant in its brief, the common-law defenses would bar recovery. Logically, therefore, in a maritime case, the maritime defenses should pre-

vail because the act itself refers to the substantive rules of maritime law in such cases.

Even as a matter of statutory construction, the courts must imply a *sang-froid* to the New Jersey legislature in order to hold that whereas a seriously injured father and husband is entitled to a recovery under the maritime law even if contributorily negligent, his wholly innocent children and wife would be denied such recovery if he dies from his injuries. The legislature has not set forth this defense in the statute. Courts do not construe statutes in such a way as to produce harsh or absurd results. See *Cox v. Roth*, 348 U. S. 207, 209, 75 S. Ct. 242, 99 L. Ed. 260 (1955); *Giordano v. City Commission of Newark*, 2 N. J. 585, 67 A. 2d 454, 458 (1949). This statute is a remedial one and is entitled to a liberal construction. Therefore under the terms of the New Jersey statute itself, independently of any compulsion from a positive rule of maritime law, the rights of a widow and children with reference to the contributory negligence of a deceased workman are coextensive with the rights he would have enjoyed had he lived.

There is another ground for holding that contributory negligence is not a defense under the maritime law where a state wrongful death act is applied. The reason that maritime law permits a state wrongful death act to be applied where certain individuals die as a result of injuries received on navigable waters within a state's geographic boundaries is that there is a void in the maritime law on this point. Congress in the development of maritime law has not afforded any remedy by statute for wrongful death in such circumstances. While there is a void as to wrongful death this is not true concerning the defense of contributory negligence. Admiralty courts have fashioned a strong positive rule concerning comparative negligence. While the

enforcement of a state statute giving a remedy for wrongful death merely fills a void, the enforcement of a state rule of contributory negligence would collide with the positive, well established rule of comparative negligence in maritime law.

In the case of *Wilburn Boat Company v. Fireman's Fund Insurance Company*; 348 U. S. 310, 75 S. Ct. 368, 99 L. Ed. 337 (1955) Mr. Justice Black, in holding that state laws could be applied in disputes arising from a maritime insurance policy stated at page 370:

"Since the insurance policy here sued on is a maritime contract the Admiralty Clause of the Constitution brings it within federal jurisdiction. * * * But it does not follow, as the courts below seemed to think, that every term in every maritime contract can only be controlled by some federally defined admiralty rule. *In the field of maritime contracts as in that of maritime torts, the National Government has left much regulatory power in the States.* As later discussed in more detail, this state regulatory power, exercised with federal consent or acquiescence, has always been particularly broad in relation to insurance companies and the contracts they make.

Congress has not taken over the regulation of marine insurance contracts and has not dealt with the effect of marine insurance warranties at all; hence there is no possible question here of conflict between state law and any federal statute. But this does not answer the questions presented, since *in the absence of controlling Acts of Congress this Court has fashioned a large part of the existing rules that govern admiralty. And States can no more override such judicial rules validly fashioned than they can override Acts of Congress.* * * *"
(Italics ours.)

What, then, is the substantive maritime law as it relates to liability for personal injury? In *Hawn v. Pope & Talbot*,

Inc., 198 F. 2d 800 (3 Cir. 1952), Judge McLaughlin stated at page 806:

“ * * * Appellant advances the flat proposition that since it is a diversity action the Pennsylvania contributory negligence rule which defeats recovery must be applied. * * *

“We think that appellant's view is incorrect. * * *

On appeal the judgment of the court was affirmed in 346 U. S. 406, 74 S. Ct. 202, 98 L. Ed. 143 (1953). Mr. Justice Black stated at page 408:

“(a) *The harsh rule of the common law under which contributory negligence wholly barred an injured person from recovery is completely incompatible with modern admiralty policy and practice. Exercising its traditional discretion, admiralty has developed and now follows its own fairer and more flexible rule which allows such consideration of contributory negligence in mitigation of damages as justice requires.* Petitioner presents no persuasive arguments that admiralty should now adopt a discredited doctrine which automatically destroys all claims of injured persons who have contributed to their injuries in any degree, however slight.

“(b) Nor can we agree that Hawn's rights must be determined by the law of Pennsylvania, under which, it is said, any contributory negligence would bar all recovery in this personal injury action. True, Hawn was hurt inside Pennsylvania and ordinarily his rights would be determined by Pennsylvania law. But he was injured on navigable waters while working on a ship to enable it to complete its loading for safer transportation of its cargo by water. Consequently, the basis of Hawn's action is a maritime tort, a type of action which the Constitution has placed under national power to control in its substantive as well as its procedural features. * * * And Hawn's complaint asserted no claim created by or arising out of Penn-

sylvania law. His right of recovery for unseaworthiness and negligence is rooted in federal maritime law. *Even if Hawn were seeking to enforce a state-created remedy for this right, federal maritime law would be controlling.* While states may sometimes supplement federal maritime policies, a state may not deprive a person of any substantial admiralty rights as defined in controlling acts of Congress or by interpretative decisions of this Court. These principles have been frequently declared and we adhere to them. * * * (Italics ours.)

In *O'Leary v. United States Line Company*, 215 F. 2d 708 (1 Cir. 1954), cert. den. 348 U. S. 939, 75 S. Ct. 360, 99 L. Ed. 735 (1955), Judge Woodbury reviewed several decisions, including one from this circuit, and discussed the question of contributory negligence under a state wrongful death act. He stated at page 711:

* * * But these cases were all decided prior to *Pope & Talbot, Inc. v. Hawn*, 1953; 346 U. S. 406, 74 S. Ct. 202 wherein the Supreme Court of the United States in a civil action on the law side under the saving clause for the first time held categorically that the rights of a shore worker to recover for personal injuries short of death occurring on a vessel in the navigable waters of a state resulting from either the negligence of the shipowner or the unseaworthiness of the vessel are to be determined by the general maritime law and not by the law of the state within whose waters the accident occurred. That case, of course, is not squarely in point here, but in the Court's opinion 346 U. S. at page 409, 74 S. Ct. at page 205 it is said by way of dictum that 'Even if Hawn were seeking to enforce a state-created remedy for this right (referring to his right of recovery for unseaworthiness and negligence), federal maritime law would be controlling.' Indeed, in our opinion it would be incongruous to hold, in conformity with *Pope & Talbot, Inc. v. Hawn*, *supra*, that the maritime law determined the respective rights

of the parties in the event of personal injuries short of death, but that state law determined their rights in the event of injuries resulting in the ultimate consequence of death. And, it would be even more incongruous to hold that the husband's right of action, which the plaintiff here asserts in her count two under the local survival statute, is to be determined under the rule of Pope & Talbot by the maritime law, but that the right of action arising out of the same accident conferred directly upon her by the local death act is to be determined by local law. Furthermore, as the Supreme Court pointed out in *Chelentis v. Luckenbach S.S. Co.*, 1918, 247 U. S. 372, 384, 38 S. Ct. 501, 62 L. Ed. 1171, the saving clause reveals no intention that liability as well as remedy shall be determined by the common law rather than the maritime law, and to apply state substantive law to determine the rights of the parties would create divergence in a field where uniformity has long been considered important. * * *

In *The Devona*, 1 F. 2d 482 (D. C. Me. 1924) the court had before it the Maine Wrongful Death Act which uses the same key phraseology as the New Jersey Act. In denying the applicability of the common-law defense of contributory negligence, Judge Held stated among other things at page 484:

"The case at bar also discloses rights distinctly maritime and 'recognized by the law of the sea,' without regard to the court where the libellant may seek relief. The libellant must take the state statute with its limitation; *but the limitation of contributory negligence is not found in the statute.* A state court may well find that it cannot settle a maritime case by the common-law rules of procedure, and must enforce the libellant's rights under the maritime provisions as disclosed in the Jensen Case, which has held that 'no state has the power to abolish the well-recognized maritime rule concerning the measure of recovery,' and substitute therefor the full indemnity rule of the common law.'" (Italics ours.)

There are two distinct grounds for holding that contributory negligence is not a defense to this action under the New Jersey Wrongful Death Act. The first is based on the interpretation of the act itself. The act does not state that such defense is available in an action for wrongful death. On the contrary, the referral phrase "such as would, if death had not ensued, have entitled the person injured to maintain an action for damages" is used, N. J. S. A. 2A:31-1. This phrase, by referring to the rights of the person injured, if death had not ensued, indicates that not only is the substantive law relating to the nature and scope of liability for personal injury incorporated into the wrongful death act, but the defenses are incorporated as well. There is certainly no reason to suppose the legislature intended to give any better or stronger defense to the respondents where a widow and dependent children sue than where the injured himself sues.

The second ground is based on the fact that the injury occurred on navigable waters of the United States and is covered by substantive maritime law which supersedes and overrules inconsistent state law. The doctrine of comparative negligence is a positive rule of maritime law and is firmly embedded in maritime law. There certainly is no reason why it should be replaced by a harsh and inconsistent state doctrine.

In this connection we note that *Klingseisen v. Costanzo Transportation Co.*, 101 F. 2d 903 (3 Cir. 1939) cited by defendant, held that in an action under maritime law applying the Pennsylvania Wrongful Death Act, the absolute defense of contributory negligence would be applied. In that case the deceased was drowned in a collision between his own boat and a steam boat. No issue of unseaworthiness was involved. Since this case involved an application of a Pennsylvania statute and its interpretation by Pennsyl-

vania courts it is not controlling in an interpretation of a New Jersey statute.

The petitioners state in their brief that in *Hill v. Waterman*, 251 F. 2d 655 (3 Cir. 1958) the Court of Appeals decided that contributory negligence should be a defense to an action brought under the New Jersey Wrongful Death Act (P. br. 10, 26). However, this is entirely incorrect. The *Hill* case involved the Pennsylvania Wrongful Death Act which is entirely different from the New Jersey act in its wording. Furthermore the court in *per curiam* opinion in the *Hill* case cited two other cases in which it had interpreted the Pennsylvania act. Both of these cases had been decided prior to the *en banc* decision in the *Skovgaard* case, yet in the *Skovgaard* case the majority refused to pass on the question of the defense of contributory negligence before the court below made its factual findings.

In each case the court had dissimilar statutes before it with different decisions on construction of different state courts in interpreting those statutes. Consequently the majority recognized that *as a matter of interpretation of a state statute* the results may differ greatly when the statutes of different states are considered to supplement maritime law. The conclusion of petitioner's attorney that in the *Hill* case the court found that contributory negligence was a defense under the New Jersey Wrongful Death Act is in error. Since the Pennsylvania statute is completely different in wording from the New Jersey statute the conclusion cannot be supported.

In the Pennsylvania statute, 12 Purdon, Penna. Statutes Anno. ss1601, the test of liability is merely set forth as "unlawful violence or negligence" rather than "wrongful act, neglect or default" as set forth in the New Jersey statute. Furthermore, the Pennsylvania statute does not not employ the "such as" test of the New Jersey statute

which incorporates the test of liability based on the rights of the deceased if he had lived.

POINT V

The evidence supported findings of both negligence and unseaworthiness and these issues were properly submitted to the jury.

There was ample evidence to support jury findings of both negligence and unseaworthiness. On the basis of the evidence, a good part of which was undisputed, the issues were properly submitted to the jury. *Schulz v. Pennsylvania Railroad Company*, 350 U. S. 523, 76 S. Ct. 608, 100 L. Ed. 668 (1956); *Ferguson v. Moore-McCormack Lines*, 352 U. S. 521, 77 S. Ct. 457, 1 L. Ed. 2d 511 (1957); *Honeycutt v. Wabash Railway, Co.*, 355 U. S. 424, 78 S. Ct. 393, — L. Ed. — (1958).

The defendant had an affirmative non-delegable duty to provide a reasonably safe place to work and a seaworthy vessel. This duty it failed to perform. The law relating to these duties was discussed.

The trial court in denying the motion for directed verdict made by the defendant at the close of the case, clearly summed up the evidence submitted (R. 145).

"The Court: Your statement up to the last moment was all right as far as it went. In other words, you are recognizing that the ventilating system of the ship was inadequate to remove carbon tetrachloride, and I am sure that there is no point to argue or disagree with you that a ship perhaps ordinarily is not required to have a ventilating system that could remove a poison of that type which is rarely used. The moment that you specify carbon tetrachloride as the chemical to be used in cleaning the generator, and it was known that it was

a dangerous substance, then there was a duty certainly to see that the ventilating system was supplemented and aided by other methods of withdrawing the fumes, and that presents the basic question in the case, it seems to me. Whether the ventilating system both that which was part of the ship regularly and that which was brought in as auxiliary equipment constituted a sufficiently adequate system in order that the men might work there with reasonable safety.

I hold there is a question of fact for the jury to pass upon. Your motion is denied."

Judge Learned Hand in reviewing the evidence in this case stated (R. 148):

" * * *. Part of the work was to clean the ship's generators which had become fouled in use, and Rodermond Industries subcontracted this part of the job to K. & S. Electrical Company, the employer of the decedent, Halecki. On the 28th he and Doidge, a fellow worker, set up the necessary equipment on the boat. Since she was at the time without any electrical current, it was necessary to bring in current from the shore. The generators were cleaned by spraying them with carbon tetrachloride, a volatile liquid, which will 'remove all traces of dirt and film' (fol. 165), but whose fumes, unless their density is carefully controlled, may be deadly. The generators were in the ship's engine-room, one deck below the main deck, and Doidge and the decedent sought to protect themselves during the work, (1) by using gas masks, and (2) by bringing two "air hoses" and a "blower," actuated by the current from the shore. One hose was used to spray the tetrachloride upon the generators; the other, to blow in fresh air from the outside. The 'blower' was set at the bottom of the engine-room near the generators, and from it led an exhaust pipe to an open door about eight feet above. In addition, the ship's permanent ventilating system was set in action by the outside current; it consisted of some fans and 'vents' at the top of the engine-room through which air was drawn in. Thus,

means of exhausting the contaminated air consisted of (1) the hose that was not used to spray, (2) the 'blower,' and (3) the increase of air pressure resulting from the intake of the ship's own ventilating system. Besides this, an open door and an open skylight led to the air. A biochemist, familiar with the use of tetrachloride, after being told in detail the size of the engine-room and the apparatus installed, gave as his opinion that the ventilating system in the engine-room, even when supplemented by the apparatus brought on board and installed by Doidge and the deceased was not 'adequate to remove the fumes.' The competence of this expert to give an opinion was so much within the discretion of the trial court that only in a clear case should we overrule its decision. * * *

On the basis of the evidence the jury could have found that the defendant specified and ordered that carbon tetrachloride be used in the cleaning in the engine room of the vessel; that its engine room was a confined space and that the use of carbon tetrachloride in such an area without furnishing proper and adequate ventilating equipment was dangerous and would make the engine room an unsafe place to work. The jury could further have found from the evidence that the defendant knew or should have known that the ship's ventilating equipment was inadequate and would not make the engine room a safe place to work; that the defendant, by its officers was present when additional equipment was placed in the engine room and that they knew or should have known that this additional equipment was inadequate and would not make the engine room a safe place to work.

The jury could and did find that the defendant was negligent and that the vessel and its equipment was inadequate and unseaworthy.

The evidence discloses that carbon tetrachloride was specifically ordered by defendant to be used in the confined

engine room of the vessel (R. 73; R. 130; R. 146). Carbon tetrachloride is a dangerous chemical (R. 109; R. 116). It is five times heavier than air (R. 115). Taking into consideration the size of the engine room and the amount of carbon tetrachloride used during six hours, a concentration of at least 20,000 parts per million would be produced and be present if it were not properly removed by adequate ventilating equipment (R. 23; R. 24; R. 26; R. 27). A concentration of 50 to 100 parts per million units of weight per unit of volume was considered a safe concentration (R. 111). The concentration produced was at least 200 times the allowable safe concentration. Because of the weight of carbon tetrachloride, the greatest concentration would occur at the bottom of the confined engine room (R. 115). The full potential concentration was actually greater than 200 times the allowable safe concentration because there was machinery which occupied part of the space in the engine room and the concentration was greater at the bottom of the room where decedent worked. Proper ventilation would require ventilating ducts at floor level and there were none at that level in the engine room (R. 117). The auxiliary blower fan and air hose did not remove any vapors as to reduce the dangerous and unsafe concentration of carbon tetrachloride (R. 36). It was conceded by defendant's expert that the existing ventilation system of the engine room was inadequate to remove the accumulation of carbon tetrachloride vapors in the engine room caused by the use of carbon tetrachloride in the place as ordered by defendant (R. 144). The Chief Engineer of the vessel knew or should have known of the type and capacity of the ventilating system on his vessel. He knew that the deceased was going to work in the confined area of the engine room with carbon tetrachloride as ordered by the defendant and of the dangerous character of carbon tetrachloride when used in a confined space without adequate

ventilation (R. 75; R. 76). The Chief Engineer was not called to testify although he was still in the employ of defendant (R. 138).

The work which the deceased and his fellow employees were doing, was done in conjunction with the work of the ship's crew and it was done with the participation of and under the control of defendant's officers and agents (R. 75; R. 76; R. 96; R. 124; R. 125; R. 130; R. 146).

The carbon tetrachloride was used because it was specified by defendant by name (R. 96). There were safer substitutes for carbon tetrachloride which could have been used (R. 97).

Captain Haley had testified on deposition on cross-examination by his own attorney (R. 130):

"Q. Captain, can you tell me the purpose for which the ship was put into Rodermond Industries? A. For the annual overhaul.

Q. Just briefly what did that consist of? A. That consisted of deck and engine work.

Q. Repairs and overhaul? A. Repair and overhauls, yes.

Q. Was that work done under your orders? A. No, sir.

Q. To your knowledge was it done under any orders of any of the members of the Pilot Association? A. Under the orders of the marine superintendent.

Q. When you say under the orders of the marine superintendent, you mean in accordance with the specifications? A. That is correct."

The crew had remained on board the vessel and it participated in the work going on. In fact the specifications provided with reference to the very generators on which deceased was working that "Crew to remove and replace 8 cylinder heads for the port and stabd. generators" (R. 146). The ventilators belonged to the ship (R. 8). The

blower belonged to Rodermond (R. 81). During the week the engine crew of the vessel worked on the diesel engines below decks (R. 75). The Chief Engineer was present on Friday when Doidge made preparations and put the blower in position to do the work on Saturday (R. 76; R. 82).

Mr. Doidge had testified (R. 96):

"Q. And was the work being done under the supervision of the chief engineer, as far as the engine room was concerned? A. Oh, yes."

He also testified (R. 104):

"Q. With reference to the work which you are doing, you knew, you told us, of the dangers of carbon tetrachloride, is that correct? A. That is correct.

Q. And isn't it a fact that you spoke to the engineer of the vessel before you used it that Saturday? And did you talk to him about the danger of the carbon tetrachloride, the carbon tetrachloride? A. He knew about it.

Q. You talked to him about it? A. Surely, That is the reason we wanted the ship cleared."

The full complement of engineers and engine room crew remained on board the vessel during the period it was at Rodermond (R. 124). They maintained the engines and did any other work that had to be taken care of (R. 125). At night the engineers usually slept on board (R. 125). We have already quoted the testimony of Captain Haley that the work on the vessel was done "under the orders of the marine superintendent," an employee of the defendant.

The defendant failed to produce its Chief Engineer who would know of the condition of the vessel, the engine room, the ventilators, and the arrangements made with Mr. Doidge for doing the carbon tetrachloride work on a Saturday. He was still in defendant's employ (R. 128). They failed to produce their Marine Superintendent who was still in their employ (R. 139). They failed to have Captain Haley

testify although he had been in court and plaintiff had read part of his testimony (R. 137). In short those witnesses who were in the best position to testify to the condition of the engine room, the ventilation system, and circumstances under which plaintiff performed his work were not produced. In *Chesapeake & Ohio Ry. Co. v. Richardson*, 116 F. 2d 860 (6 Cir. 1941), cert. den. 313 U. S. 574, 61 S. Ct. 961, 85 L. Ed. 1531 (1941), Judge Hamilton remarked at page 865:

“* * * The unexplained failure of a party to produce a witness under such circumstances is a fit subject for fair comment and may justify an inference unfavorable to the party in default. * * *”

The defendant's expert testified that the ship's ventilating system was inadequate for carbon tetrachloride cleaning to be done in the vessel's engine room. He testified (R. 143):

“Q. In your opinion, was that system adequate to remove carbon tetrachloride from the engine room?
A. In my opinion it was not.

Q. And why do you say that, Mr. Finkenaur? A. I don't see how you could expect any ship's ventilating system to take care of those noxious gases that are introduced, and particularly those that are heavier than air and lie down near the bilges. You would have to have a special blowing device to stir that air up and permit it to circulate out with the rest of the exhausted air.”

The dangerous character of the carbon tetrachloride in the confined space of the engine room was established at the trial. Dr. Gaines testified (R. 116):

“Q. What about the use of carbon tetrachloride in confined areas? Is that a safe or dangerous practice?
A. In confined areas it is dangerous.

The Court: What do you mean by 'confined areas'?

The Witness: Any room where you do not have ventilation where the vapors, when they do accumulate, will gradually come down to the level of the individual using it so that he can inhale them. In other words, the vapors of carbon tetrachloride cannot and do not escape from the room when it is being used."

The fact that the deceased died from carbon tetrachloride poisoning was also well established (R. 107; R. 142; R. 143). Dr. Gaines' testimony concerning the inadequacy of the ventilation, even with Rodermond blower and the gas masks was not substantially challenged. Plaintiff's attorney asked a lengthy hypothetical question involving all the pertinent evidence in the record. Defense counsel made an objection which was sustained. Then the court asked (R. 36):

"The Court: In other words, just referring to conditions in the engine room as they are outlined to you by counsel, do you have any opinion that you can express with reasonable certainty as to whether or not the ventilating system in that room was reasonably adequate in order to remove the fumes?"

The Witness: I have an opinion.

The Court: And what is your opinion?

The Witness: My opinion is that it was not adequate.

The Court: All right, that is your opinion. That is all you want?

Mr. Baker: That's all."

CONCLUSION

The inadequacy of the ship's ventilation system for the use for which it was provided was not disputed. The knowledge of the officers of the vessel of the work to be done by the deceased and the place where it was to be done was not denied.

The defendant specifically ordered the use of a chemical in a confined area, which was highly dangerous. The ven-

tilating system and auxiliary equipment were not adequate for the work to be done; that is, spray cleaning with carbon tetrachloride. The defendant and its officers knew or should have known of the unsafe condition created by the inadequacy of the ventilating equipment. The evidence supported findings of negligence and unseaworthiness, which issues were presented to the jury under proper charges by the trial court.

Pursuant to the principles of law set forth in the majority opinion of the Court of Appeals written by Judge Learned Hand and discussed in this brief the verdict of the jury is sound both as to the law applied and the facts presented.

WHEREFORE plaintiff requests that the judgment of the Court of Appeals be affirmed with costs on this appeal.

Respectfully submitted,

NATHAN BAKER
Counsel for Respondent

BAKER, GARBER & CHAZEN
Attorneys for Respondent

BERNARD CHAZEN
MILTON GARBER/
On the Brief

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In the Supreme Court of the United States

OCTOBER TERM, 1958

UNITED NEW YORK AND NEW JERSEY SANDY HOOK
PILOTS ASSOCIATION, A CORPORATION, AND UNITED NEW
YORK SANDY HOOK PILOTS ASSOCIATION, A CORPORA-
TION, PETITIONERS

v.

ANNA HALECKI, ADMINISTRATRIX AD PROSEQUENDUM
OF THE ESTATE OF WALTER JOSEPH HALECKI, DE-
CEASED, AND ANNA HALECKI, ADMINISTRATRIX OF THE
ESTATE OF WALTER JOSEPH HALECKI, DECEASED

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

J. LEE RANKIN,

Solicitor General,

GEORGE COCHRAN DOUB,

Assistant Attorney General,

SAMUEL D. SLADE,

LEAVENWORTH COLBY,

SEYMOUR FARBER,

Attorneys,

Department of Justice, Washington 25, D. C.

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In the Supreme Court of the United States

OCTOBER TERM, 1958

No. 56

**UNITED NEW YORK AND NEW JERSEY SANDY HOOK
PILOTS ASSOCIATION, A CORPORATION, AND UNITED
NEW YORK SANDY HOOK PILOTS ASSOCIATION, A
CORPORATION, PETITIONERS**

v.

**ANNA HALECKI, ADMINISTRATRIX AD PROSEQUENDUM
OF THE ESTATE OF WALTER JOSEPH HALECKI, DE-
CEASED, AND ANNA HALECKI, ADMINISTRATRIX OF THE
ESTATE OF WALTER JOSEPH HALECKI, DECEASED**

**ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE SECOND CIRCUIT**

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

OPINIONS BELOW

The judgment of the United States District Court for the Southern District of New York, pursuant to the verdict of a jury, was entered without an opinion (R. 65-66). The majority opinion in the United States Court of Appeals for the Second Circuit (R. 147-154) and the dissenting opinion (R. 154-160) are reported at 251 F. 2d 708.

JURISDICTION

The judgment of the Court of Appeals was entered on January 10, 1958 (R. 161). A timely petition for rehearing was denied on January 31, 1958 (R. 171), and a petition for rehearing en banc was denied on February 20, 1958 (R. 172). The petition for a writ of certiorari was filed on April 28, 1958, and granted on June 9, 1958 (R. 172; 357 U. S. 903). The jurisdiction of this Court rests on 28 U. S. C. 1254 (1).

QUESTION PRESENTED

The only question discussed in this brief is the following:¹

¹ While the United States takes no position, in this brief, with respect to those issues raised in the petition for certiorari concerning the applicability of the New Jersey Wrongful Death Statute and the extent to which contributory negligence may limit or bar recovery thereunder, it has been our view in prior litigation that, by virtue of 46 U. S. C. 767, the federal maritime law applies the state statute according to state law not only as to rights in rem and limitations, but also as to contributory negligence, and, therefore, that the state rule, and not the admiralty rule as to contributory negligence, should apply. See *United States v. Waterman Steamship Corp.*, 190 F. 2d 499, 503 (C. A. 5). Accord; *Curtis v. A. Garcia y Cia*, 241 F. 2d 30 (C. A. 3); *Hartford Accident & Indemnity Co. v. Gulf Refining Co.*, 230 F. 2d 346, 351 (C. A. 5); *Graham v. A. Lusi, Limited*, 206 F. 2d 223 (C. A. 5); see, also, *The Bernina (No. 2)*, 12 P. D. 58, affirmed on other grounds *sub nom. Mills v. Armstrong*, 13 App. Cas. 1; see also *Hill v. Waterman Steamship Corp.*, 251 F. 2d 655 (C. A. 3), pending on petition for a writ of certiorari, No. 147, this Term; *Union Carbide Corp. v. Goett*, 256 F. 2d 449, 453 (C. A. 4), pending on petition for a writ of certiorari, No. 307, this Term.

Whether a shipowner warrants the "seaworthiness" of a vessel to a shore-based worker who performs labor on a ship which is not ready for a voyage but is out of navigation and docked in a private shipyard for its annual overhaul and repair.

STATEMENT

On September 22, 1951, the pilot boat "New Jersey,"² owned by the petitioners, was brought into the private shipyard of Rodermond Industries, Inc. (Rodermond), located at the foot of Henderson Street, North River, Jersey City, New Jersey, for the purposes of undergoing its annual overhaul and repair (R. 121-122, 124, 148). The overhaul required the vessel to be out of operation and in the repairyard for approximately three weeks (R. 133). During this period, four or five members of the deck crew, who were brought into the repairyard with the ship, painted the ship's deck, bridge, galley, mess-hall and rooms and performed certain minor repairs (R. 124).³ The drydocking and major repairs, to be done by Rodermond, included in the "List of Repairs" drawn up by Rodermond on September 24, 1951 (R. 10, 72, 146) an item under the heading "Port & Stbd Generators," that the crew was to remove and replace the eight cylinder heads for the port and starboard generators, and that Rodermond was to "remove the eight

² The "New Jersey" was described as being "about 170 feet long" with a displacement of 448 gross tons (R. 132). Her primary duties were to service pilots for ships entering and leaving New York Harbor (R. 121-122).

³ When the ship was in regular operation it ordinarily carried from seven to ten deck employees (R. 122).

(8) heads to the shop, disassemble same, grind in the valves, thoroughly clean out the heads, reassemble and return to vessel. Stone commutators to remove high spots and ridges and cut clean to mica all segment bars. Clean and adjust brush riggings and brushes" (R. 146).

Under the same heading, the "List of Repairs," prepared by Rodermond further provided (*ibid.*):

Spray clean with carbon tetrachloride the armature and field windings to remove all traces of dirt and film. Close up and prove in good order.

Since Rodermond's shipyard was not competent to perform electrical work (R. 16), it subcontracted this part of the repair job, which included the spraying of the generators with carbon tetrachloride, to a regular electrical contractor, the K & S Electrical Company, the employer of the decedent, Walter J. Halecki (R. 16, 71).

The K & S foreman, Donald Doidge, and the decedent, Halecki, started working on the "New Jersey" on Monday, September 24, 1951. On that date, Mr. Doidge consulted with the ship's chief engineer as to when the subcontractor's men could best do the carbon tetrachloride spraying since "we know it has to be done when there is nobody else on board ship" (R. 73). Doidge had been an electrician for about twenty-five years, and Halecki had been working with him for about six years. (R. 3, 71). They had used carbon tetrachloride to clean generators located in factories and buildings; their work had also included ships (R. 11-12). Doidge testified he was aware of

the difference between work in a factory and in a ship's engine room (R. 103).⁴ He thought it unnecessary to discuss with the ship's chief engineer the danger or the special need of ventilation because "We knew what it was all about" (R. 3, 74).

It was decided that Saturday, when nobody would be present, would be the best time for the subcontractor to do the work (R. 73-74). Pursuant to these arrangements, Doidge and Halecki made preparations on Friday for the spraying that would be done the following day (R. 4, 75). They brought on board and into the ship's engine room two air hoses and a high compression ventilating blower, equipment which belonged to Rodermond (R. 4, 81). One air hose was to be used to spray the tetrachloride upon the generator, and the other, placed underneath the generator, was to blow the fumes away from the man who was spraying (R. 4). The blower was set so that it would exhaust foul air out through one of the two open doorways of the engine room (R. 5).⁵

⁴ It was never controverted that, as petitioners' expert testified, the ship's ventilating system was entirely adequate to perform the function of ventilating the engine room with fresh air while the ship was in regular operation, but that no ship's ventilating system would be adequate to deal with the situation presented during the repairs, involving a substance which settled to the floor where the ship's ventilating system could not dislodge it (R. 40, 144):—"I don't see how you could expect any ship's ventilating system to take care of those noxious gases that are introduced, and particularly those that are heavier than air and lie down near the bilges."

⁵ Carbon tetrachloride is a substance which settles to the floor from which it cannot be dislodged by ordinary ventilating equipment (R. 111, 115, 117, 121).

On Saturday morning, September 29, Doidge and Halecki boarded the "New Jersey" to undertake the spraying (R. 6, 9135). The only other person aboard the vessel was the watchman, Walter C. Thompson, who was warned to stay out of the engine room and to prevent others from going down there (R. 135). Doidge and Halecki brought with them three gas-masks and 10 gallons of carbon tetrachloride which belonged to their employer, K & S Electrical Company (R. 6, 9, 91, 99). The masks were checked but their sufficiency was not tested on this occasion (R. 99-102).

Because the ship's engines and auxiliaries were shut down or "dead" for the entire period that the ship was out of operation and undergoing repair (R. 7-8), it was necessary to bring in current from a shoreside generator* to operate not only the equipment that Doidge and Halecki had brought on board but also the ship's own ventilating system which they kept properly operating at all times, although it served only to bring in fresh air (R. 7-8, 12-13). Similarly, they kept the engine room doors and skylights wide open at all times (R. 5-6, 15, 102). Halecki wore a gas-mask and did most of the spraying. The work began at about 9:00 a. m. and concluded at about 3:30 p. m. (R. 92, 94); it was performed ten to fifteen minutes at a time with intervening rest periods of equal length (R. 10, 93, 156). Halecki became ill the following day and died two weeks thereafter from carbon tetrachloride poisoning (R. 107, 156).

* This shoreside generator, necessary to furnish power for the dead ship, belonged to Rodermond (R. 13).

Respondent, administratrix of the decedent's estate, brought suit, pursuant to the New Jersey Wrongful Death Statute, in the United States District Court for the Southern District of New York. The complaint, based upon two counts, alleged (1) negligence in providing an unfit place to work for the decedent; and (2) breach of a warranty of "seaworthiness" (R. 148, 149). The case was submitted to the jury on both counts, and the jury found in favor of the respondent in the total amount of \$65,000¹ (R. 64-65). Judgment was entered accordingly (R. 65-66).

The Court of Appeals affirmed, with Circuit Judge Lumbard dissenting. The majority held, *inter alia*, that, in view of this Court's prior decisions in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, and *Alaska Steamship Co. v. Petterson*, 347 U. S. 396, the warranty of "seaworthiness" was properly extended to the decedent in the circumstances. The court stated (R. 150-151):

* * * We can see no distinction between the work of the decedent in the case at bar and that of the plaintiff in *Pope & Talbot v. Hawn*, *supra* (346 U. S. 396), which was carpenter's repair work. We think that the test is whether the work is of a kind that traditionally the crew has been accustomed to do, and as to that it makes no difference that the means employed

¹ Damages of \$62,500 were awarded for "pecuniary loss to the widow and dependent children"; damages of \$2,500 were awarded for "conscious pain and suffering to the decedent" (R. 66). Proper objections to the charge that the warranty of seaworthiness applied were taken (R. 62) and proper motions in arrest of judgment made (R. 65).

have changed with time, or whether defective apparatus was brought aboard and was not part of the ship's own gear. Since the deceased was cleaning the ship, we hold that it was within the doctrine of *Pope & Talbot v. Hawn, supra*.^{*}

Judge Lumbard, in his dissenting opinion, was unable to subscribe to the principle that "a shore-based worker who performs any labor on a ship, even though the ship is out of operation and tied fast to a dock for overhaul, should have extended to him a warranty of seaworthiness merely because the work which he is doing can be generally characterized in terms of the duties which a seaman could be expected to perform". He declared (R. 154):

It is not enough to categorize Halecki's work as cleaning ship's equipment. Here the inescapable fact is that Halecki, in spraying the generators with carbon tetrachloride, was doing something which a seaman could not do, which no seaman had ever done, and which would expose the seaman's life to serious danger if he even attempted it.

Judge Lumbard would have reversed and remanded the case for a new trial solely on the issue of negligence (R. 160).

^{*} Judge Hand for the majority assumed that the Second Circuit's earlier decision in *Guerrini v. United States*, 167 F. 2d 352, certiorari denied, 335 U. S. 843, was "wrong" in view of this Court's subsequent decisions in *Pope & Talbot* and *Petterson*. Judge Hand, however, did not give weight to the fact that in *Pope & Talbot* the vessel was loading for her voyage and the work performed was directly related thereto, while in *Guerrini*, as here, the work was being performed on a vessel taken out of navigation for the specific purpose of undergoing repair.

INTEREST OF THE UNITED STATES

The United States is directly interested in the basic issue posed by this case, *viz*, whether a shipowner is to be held absolutely liable, irrespective of negligence, for damages sustained by a shore-based worker who performs labor on a vessel which is not represented to be ready and seaworthy for a voyage but, on the contrary, is out of regular operation. As the world's largest shipowner, the United States has an important financial stake in the resolution of this legal problem. There are now pending several claims involving government vessels, comparable to respondent's claim. Since the United States acts as a self-insurer with respect to many of its vessels, its special interest in this problem is far greater than that of most shipowners.

INTRODUCTION AND SUMMARY OF ARGUMENT

Upon the premise that the decedent, in cleaning the ship's generators with carbon tetrachloride spray, was performing work "of a kind that traditionally the crew has been accustomed to do" (R. 150), the court below has concluded that, in view of this Court's decisions in *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, *Pope & Talbot, Inc. v. Hawn* 346 U. S. 406, *Alaska Steamship Co. v. Petterson*, 347 U. S. 396,* the shipowner warranted the "seaworthiness" of its vessel to the decedent, although concededly the vessel was not represented as ready for a voyage but on the contrary was withdrawn from regular operation. It is not our purpose in this

* Affirming, *per curiam*, *Petterson v. Alaska Steamship Co.*, 205 F. 2d 478 (C. A. 9).

brief to dispute the premise of the court below that cleaning is seamen's work or to engage in the almost impossible task of delineating precisely what work the crew has been "traditionally" accustomed to perform. Rather, starting with full acceptance of *Sieracki* and this Court's subsequent cases, it is our aim to show that the "type of work" test is not determinative of the problem; that the shipowner's warranty of a seaworthy vessel is for a voyage, with all its incidents of loading and unloading, and does not extend to situations, as here, where the vessel is not ready to go to sea but has been taken out of operation for the specific purpose of doing work directed to ensuring its seaworthiness upon its subsequent return to operation. Thus, we show that the warranty of "seaworthiness," as established by this Court's decisions, does not and should not be extended to situations involving services performed on a vessel while it is not represented to be seaworthy for a voyage, but, on the contrary, is out of operation. We show further that neither historical, nor other considerations, would justify the extension of the ship owner's burden of absolute liability from vessels ready for sea and for loading and unloading in port to those, in the words of Judge Lumbard, "beyond the shipyard gates" (R. 157).

ARGUMENT

THE SEAWORTHINESS DOCTRINE DOES NOT, AND SHOULD NOT, APPLY TO A VESSEL WHICH IS NOT WARRANTED READY FOR NAVIGATION

A. THIS COURT'S DECISIONS IN *SIERACKI*, *POPE & TALBOT*, *PETTERSON*, AND *ROGERS* COVER ONLY WORK PERFORMED ON A VESSEL REPRESENTED AS SEAWORTHY FOR A VOYAGE

In *Seas Shipping Co. v. Sieracki*, 328 U. S. 85, the Court extended the shipowner's absolute warranty of a seaworthy ship from those, such as shippers, passengers and seamen, who are in privity of contract with the shipowner, so as to bring within its protection longshoremen, and other shore-based workmen employed by independent special contractors who are engaged nonetheless in work incident to the loading or unloading of the vessel in the course of its voyage.¹⁰ The rationale of this extension, foreshadowed by Judge Benedict's opinion in *Gerrity v. Bark Kate Cann*, 2 Fed. 241, 246 (E. D. N. Y.), and similar to that of *MacPherson v. Buick Motor Co.*, 217 N. Y. 382, is that the shoreworkers, although not

¹⁰ That seamen were entitled to the same warranty of the vessel's seaworthiness for the voyage as were shippers and passengers was recognized by Judge Peters in *Dixon v. The Cyrus*, 2 Peters Adm. 407, 7 Fed. Cas. No. 3,930 (D. Pa.), and was early affirmed by the textwriters. Curtis, *Rights and Duties of Merchant Seamen* (Boston, 1841), p. 20; 2. Parsons, *Shipping and Admiralty* (Boston, 1869), p. 78. The classical formulation is found in *Rainey v. New York & P. S. S. Co.*, 216 Fed. 449, 453 (C. A. 9), where, after discussing the warranty of seaworthiness for the voyage as applied by this Court in the case of shippers, the court declared: "A fortiori does the same rule apply to cases where the lives of passengers or crew are involved." For the history of the doctrine in seamen's cases see *Adams v. Bortz*, 279 Fed. 521 (C. A. 2).

in privity of contract, are equally within the representation of the vessel as seaworthy for the voyage.

The *Sieracki* decision was further based on the premise that loading and unloading were part of the voyage and that, "Historically the work of loading and unloading is the work of the ship's service, performed until recent times by members of the crew" (328 U. S. at 96).¹¹ The Court held, therefore, that the shipowner could not escape the consequences of his traditional representation of the vessel as seaworthy for the voyage by parcelling out to intermediary employers services incident to navigation which were traditionally performed by seamen. "For these purposes he [the longshoreman] is, in short, a seaman because he is doing a seaman's work and incurring a seaman's hazards" (328 U. S. at 99).

The Court found further support for its result in "the trend and policy" (328 U. S. at 97) of its prior decisions in which longshoremen loading and unloading vessels were treated as "seamen" and thus conferred rights of recovery under the Jones Act¹² (*International Stevedoring Co. v. Haverty*, 272 U. S. 50); and in which an injury to a longshoreman was classi-

¹¹ This factual premise is sharply disputed in Tetreault, *Seaman, Seaworthiness and the Rights of Harbor Workers*, 39 Cornell L. Q. 381, 413-414 (1954). A scholarly account of the seaworthiness doctrine is found in Benbow, *Seaworthiness and Seamen*, 9 Miami L. Q. 418 (1955).

¹² The Merchant Marine Act of 1920, 41 Stat. 988, 1007, 46 U. S. C. 688, extended to "seamen" the benefits of the Federal Employers Liability Act, 35 Stat. 65, 45 U. S. C. 51. By statute (46 U. S. C. 713), "seaman" includes "every person (apprentices excepted) who shall be employed or engaged to serve in any capacity on board."

fied as a marine tort and thus considered within the admiralty jurisdiction. *Atlantic Transport Co. v. Imbrovek*, 234 U. S. 52.

In three subsequent decisions, involving loading or unloading for the course of a voyage, this Court has reaffirmed its *Sieracki* conclusion. In *Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406, a carpenter whose work involved the repair of a "slight defect" in the vessel's loading equipment, and who "was put to work on it so that the loading could go on at once" (*id.* at 413), was held to be entitled to recover on the ground of unseaworthiness. Again, in *Alaska Steamship Co. v. Petterson*, 347 U. S. 396, the Court affirmed, *per curiam* and without opinion, a decision of the Ninth Circuit¹³ granting the protection of the warranty of seaworthiness to a longshoreman injured by a breaking block while engaged in loading the vessel for a voyage. And, finally, in *Rogers v. United States Lines*, 347 U. S. 984, the Court held, again *per curiam* and without opinion, that a longshoreman unloading at the voyage end was equally within the warranty.¹⁴

Thus, in each of the cases in which this Court has applied the warranty of seaworthiness to non-members of the ship's company, it is plain that the vessel was in navigation on a voyage and represented by her owner as being seaworthy for that purpose, with the work performed by the particular employee being directed to the immediate carrying out of the ship's voyage; in *Sieracki*, *Petterson* and *Rogers*, there was loading or unloading of the vessel in the execution of

¹³ *Petterson v. Alaska Steamship Co.*, 205 F. 2d 478.

¹⁴ Reversing 205 F. 2d 57 (C. A. 3).

her voyage, and in *Pope & Talbot* the performance of work related inextricably to the loading for the voyage itself. In none of these cases had the vessel completed her unloading and been withdrawn from navigation, as here, for the specific purpose of making it seaworthy for future voyages.¹⁵ On the contrary, the vessels *were* in active navigation on their voyages; they were held out by their owners as being in all respects in a seaworthy condition for their voyages; and this Court recognized that those who were doing the work of seamen were entitled, even in the absence of privity of contract, to rely, like crew members, upon the owners' implied representation of the vessels' seaworthiness for their respective voyages.

B. THERE IS NO JUSTIFICATION FOR EXTENDING THE *SIKRAKI* DOCTRINE TO COVER WORK PERFORMED ON A VESSEL WHILE IT IS NOT REPRESENTED AS SEAWORTHY FOR A VOYAGE BUT IS OUT OF NAVIGATION

This Court and other federal courts have consistently recognized the distinction between the legal situation of a seaman working on a vessel in navigation on a voyage and one who works on a vessel which has been removed from navigation.¹⁶ For example, in *Desper v. Starved Rock Ferry Co.*, 342 U. S. 187, the

¹⁵ The crew member cases similarly involved only the warranty of the vessel's seaworthiness for a voyage. *Mahnich v. Southern S. S. Co.*, 321 U. S. 96; *Carlisle Packing Co. v. Sandanger*, 259 U. S. 255. Cf. *The Osceola*, 189 U. S. 158, 175, and see Smith, *Liability for Injuries to Seamen*, 19 Harvard L. R. 418, 422-424 (1906).

¹⁶ The fact that the "New Jersey" was in navigable waters while it was withdrawn from regular operation for its overhaul (R. 80-81) does not, of course, make it a ship in navigation. See *Butler v. Whiteman*, 356 U. S. 271. Although the issue of whether a ship is in navigation is ordinarily one for the trier of fact, *ibid.*,

Court passed upon the question of whether one doing seasonal repair work on a boat after the end of its navigation continued to be a "seaman" within the meaning of the Jones Act.¹⁷ The decedent, Desper, had been employed during the summer months as an operator of one of a fleet of motorboats carrying sight-seers. His employment had been terminated and thereafter he had helped to lay up the boats for the winter. He was then reemployed in the spring and was injured while helping to paint, clean and waterproof the boats in preparing them for navigation. At the time of the injury, none of the boats was afloat, nor did they have a captain or crew. The Court concluded that, "while engaged in such seasonal repair work Desper was not a 'seaman' within the purview of the Jones Act. The distinct nature of the work is emphasized by the fact that there was no vessel engaged in navigation at the time of the decedent's death. All had been 'laid up for the winter'." *Id.* at 191. See, also, *Antus v. InterOcean S. S. Co.*, 108 F. 2d 185 (C. A. 6); *Hawn v. American S. S. Co.*, 107 F. 2d 999 (C. A. 2); *Seneca Washed Gravel Corporation v. McManigal*, 65 F. 2d 779 (C. A. 2); *Gonzales v. U. S. Shipping Board, E. F. Corp.*, 3 F. 2d 168 (E. D. N. Y.).

it was neither put to the jury in this case nor was it ever raised by either of the parties in the courts below. In any event, we do not think that reasonable men could conclude other than that the "New Jersey," with its engines and generators dead and its power being supplied by a shoreside generator while undergoing repair, was a ship out of navigation.

¹⁷ It will be remembered, *supra*, p. 12, that the Court, in *Sieracki*, found support for its conclusion that the longshoreman was to be regarded as a "seaman" in another Jones Act case, *International Stevedoring Co. v. Haverty*, 272 U. S. 50.

We can perceive no sound distinction between the status of the vessels and the type of work being performed in the *Starved Rock Ferry Co.* case and the status of the "New Jersey" and the type of work being performed in the instant case. While the vessel here had not been "laid up for the winter," it had nevertheless completed its voyage and been withdrawn from service for the purpose of undergoing its annual overhaul and repair. The repair work being performed was not an incident of the current voyage nor of a hurried nature as in *Pope & Talbot, Inc. v. Hawn, supra*, 346 U. S. at 413. The overhauling of the "New Jersey" required its presence in the contractor's shipyard for some three weeks, and the specialized work subcontracted out by the shipyard to the employer of Halecki and Doidge, which took almost an entire working day, was expressly undertaken at a time when no crew but only a watchman would be aboard. In these circumstances, we submit, Halecki was no more properly a "seaman" for purposes of a warranty of "seaworthiness" than was the worker, Desper, in the *Starved Rock Ferry* case for the purposes of Jones Act recovery.

Although, in many decisions, the results have been referred to the particular type of work the particular employee was performing, the lower courts have recognized implicitly that the status of the vessel at the time of the injury is a crucial factor in determining the nature of the work and the existence of a warranty of the vessel's seaworthiness. In *Berryhill v. Pacific Far East Line*, 238 F. 2d 385 (C. A. 9), certiorari denied, 354 U. S. 938, the claimant was a

workman of a shipyard corporation engaged in repair of the shipowner's vessel which was in drydock with only a skeleton crew aboard. While repairing the propulsion machinery of the vessel, a grinding wheel furnished claimant by the shipyard corporation disintegrated causing his injury. In rejecting the argument that the *Sieracki* rule was applicable, although the vessel was not engaged on a voyage, the Court of Appeals stressed that "the repairs had nothing to do with loading or unloading the ship" and were "nothing of an improvised, hurried nature, done to save the 'ship work' time, but were of sufficient importance to cause the ship to be drydocked" (238 F. 2d at 387).

In *Union Carbide Corp. v. Goett*, 256 F. 2d 449 (C. A. 4), pending on petition for a writ of certiorari, No. 307, this Term, a repairman was drowned when he fell into the water from a barge which was not in its ordinary operation but was moored at his employer's repairyard, and the vessel was claimed to be "unseaworthy" because not equipped with life rings to throw to him. The court held that the vessel had been "withdrawn from navigation" and "The warranty of seaworthiness does not apply in that situation" (*id.* at 455). See, also, *Raidy v. United States*, 153 F. Supp. 777 (D. Md.), affirmed, *per curiam*, 252 F. 2d 117 (C. A. 4), certiorari denied, 356 U. S. 973.

So, in *West v. United States*, 143 F. Supp. 473 (E. D. Pa.), affirmed by the Court of Appeals for the Third Circuit on July 2, 1958,¹⁸ the Court of Appeals declined to find that a warranty of seaworthiness was

¹⁸ A copy of this opinion is set forth in the Appendix, *infra*, pp. 22-26.

available to a claimant who was working on board a vessel which had been deactivated during the Korean hostilities, and, while alongside a pier in Philadelphia with a skeleton crew on board, was being prepared for service by a contractor. The court observed (Appendix, *infra*, p. 25): "We do not think that the [ship] at the time of this accident was a ship in navigation nor do we think that the work which [claimant] was doing was seamen's work so that the warranty of seaworthiness ran to him."

The error of the Second Circuit in this case in failing to consider the status of the "New Jersey" as not represented by her owners as seaworthy for a voyage but, on the contrary, as a ship withdrawn from navigation at the time of the injury¹⁹ is emphasized by another decision of that court, entered the same day, in *Berge v. National Bulk Carriers Corp.*, 251 F. 2d 717, certiorari denied, 356 U. S. 958. In that case, the court held there was no warranty of seaworthiness to a rigger, engaged in installing a tank bulkhead in the course of rebuilding a vessel, who was injured when a defective shackle pin caused a chain tackle to fall and dislodge him from a scaffold. The court, recognizing that the shackle pin was obviously, in the language of the

¹⁹ Judge Hand assumed in this case (R. 150) that the Second Circuit's earlier decision in *Guerrini v. United States*, 167 F. 2d 352, certiorari denied, 335 U. S. 843, refusing to extend the warranty of seaworthiness to an employee cleaning the ship's tanks while the ship was out of navigation and in a shipyard, was "wrong" in view of this Court's subsequent decisions in *Pope & Talbot* and *Pettersen*. See fn. 8, *supra*, p. 8.

trial judge, "unseaworthy" (251 F. 2d at 718), nevertheless held that there was no warranty of seaworthiness to the claimant because "the reconstruction of a ship was not traditionally the task of the crew" (*ibid.*).

If the warranty of seaworthiness is not viewed as of the vessel's seaworthiness *for the voyage*, the rigger's work in *Berge*, as Judge Lumbard noted in the instant case (R. 159), could easily have been characterized "as lowering a heavy load into the hold, a normal seaman's duty done without abnormal risk of harm." This would have been consistent with the characterization of Halecki's work in the instant case as "cleaning." However, since the ship in *Berge* was equally clearly not a vessel in navigation, it becomes plain, in our view, that the claimant could not be considered a "seaman" entitled to a warranty of seaworthiness for the voyage within the *Sieracki* rule. Similarly, the fact that the vessel here was withdrawn from navigation at the time of respondent's injury should prevent the finding of any warranty of seaworthiness because there was no representation of fitness for a voyage.

In all events there is no question but that in the present case the ship's own ventilating equipment was "seaworthy" for the purposes of ventilating the engine room—the only purpose for which it was designed to be used while the ship was in navigation (R. 40).²⁰ At a

²⁰ Cf. *Berti v. Compagnie De Navigation Cyprien Fabre*, 213 F. 2d 397, 400 (C. A. 2): "[The warranty of seaworthiness] requires only that equipment be reasonably fit for the use for which it was intended * * *". See also *Boudin v. Lykes Bros.*

time when the ship was not in the execution of a voyage, but out of navigation and undergoing repair, it was the use of the subcontractor's equipment—foreign to the ship, and, as the record discloses, foreign to any ship—that brought about decedent's injury. In these circumstances, we submit, there is no justification for the extension of the warranty of seaworthiness traditionally made in respect of a ship in navigation on a voyage.²¹

It should be noted that, even in the absence of a warranty of seaworthiness, those in the position of respondent's decedent—working on a vessel that is not in readiness for a voyage—are not without remedy against the shipowner, the shipyard, or their employer. See especially *Berryhill v. Pacific Far East Line*, *supra*, 238 F. 2d at 387-388. Actions based upon negligence, particularly in failing to furnish a safe work place, may still be brought against the ship-

S. S. Co., 348 U. S. 336, 339; *Doucette v. Vincent*, 194 F. 2d 834, 837-838 (C. A. 1); *Manhat v. United States*, 220 F. 2d 143, 148 (C. A. 2), certiorari denied, 349 U. S. 966; *Hanrahan v. Pacific Transport Co.*, 262 Fed. 951, 952 (C. A. 2).

²¹ It should be noted that the warranty of seaworthiness to seamen is correlated to that to shippers and passengers and made its first appearance in American jurisprudence in cases where mariners were suing for their wages and where the unseaworthiness of the vessel "at the commencement of the voyage" would excuse non-performance by the mariners. *E. g.* *Dixon v. The Cyrus*, 2 Peters Adm. 407, 7 Fed. Cas. No. 3,930 at p. 757 (D. Pa.); see *Tetreault, Seamen, Seaworthiness and the Rights of Harbor Workers*, 39 Cornell L. Q. 381, 389-390; *Benbow, Seaworthiness and Seamen*, 9 Miami L. Q. 418; *Smith, Liability for Injuries to Seamen*, 19 Harvard L. R. 418, 423-424.

owner or shipyard.²² And the employer may be proceeded against under the Longshoremen's and Harbor Workers' Compensation Act, 44 Stat. 1424, 33 U. S. C. 901, or, alternatively, under applicable state remedies.

CONCLUSION

The District Court erred in instructing the jury that in the circumstances of this case the defendant had warranted to the plaintiff's decedent that the vessel was seaworthy in respect of the sufficiency of the ventilating equipment brought aboard by Halecki's employer to supplement the ship's normal ventilating equipment. It is therefore respectfully submitted that the judgments of both courts below should be reversed.

J. LEE RANKIN,
Solicitor General.

GEORGE COCHRAN DOUB,
Assistant Attorney General.

SAMUEL D. SLÁDE,
LEAVENWORTH COLBY,
SEYMOUR FARBER,
Attorneys.

SEPTEMBER 1958.

²² In this case, it is impossible to tell whether the jury's verdict was based on the unseaworthiness count or on the count charging failure to furnish a safe work place. See the Statement, *supra*, pp. 7-8.

APPENDIX

United States Court of Appeals for the Third
Circuit

No. 12,507

EDGAR ALLEN WEST, APPELLANT

v.

UNITED STATES OF AMERICA, UNITED STATES DEPART-
MENT OF COMMERCE, MARITIME ADMINISTRATION, RE-
SPONDENTS

v.

ATLANTIC PORT CONTRACTORS, INC., IMPEADED
RESPONDENT

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE EASTERN DISTRICT OF PENNSYLVANIA

Argued June 2, 1958

Before MARIS, GOODRICH and McLAUGHLIN,
Circuit Judges

Opinion of the Court

(Filed July 2, 1958)

By GOODRICH, *Circuit Judge*.

This is an appeal from a judgment for the respondent in a personal injury case brought by the libelant against the United States as owner of a ship called "S. S. Mary Austin." The case is here for the second time. Following the first hearing, we sent it back to the district court for a further finding which has been made, 246 F. 2d 443 (3d Cir. 1957). The

case comes to us after a very competent discussion of its problems by the trial judge, 143 F. Supp. 473 (E. D. Pa. 1956), which has already been cited with approval by other courts.¹ We do not need to state more than a brief summary of the facts for the purpose of our discussion here.

The "Mary Austin," owned by the United States, was one of the ships put in "moth balls" at Norfolk, Virginia, after World War II. During the Korean conflict the decision was made to reactivate her and she was towed from Norfolk to Chester, Pennsylvania, and from Chester brought up and tied alongside a pier in Philadelphia. The contract for the work to put the ship back in service was let to a concern called Atlantic Port Contractors, Inc. This company had full charge of the work. On the day of the accident which is the source of this litigation, West, an engineer, was working in the low-pressure cylinder of the ship's main engine. He was hit on the knee by a metal plug which came out of an overhead water pipe when some other employee of the contractor turned on the water without warning. The plug was evidently loose enough so that the pressure of the water forced it from the pipe. West sues for the injuries thus received.

The libelant's case is in the usual form for this type of litigation. Unseaworthiness is charged; likewise, negligence in failing to provide plaintiff with a "safe place to work." The latter can be treated first because its discussion will take a very short time. On West's behalf it is urged that the duty to provide a safe place to work is absolute and nondeloggable and

¹ *Berge v. National Bulk Carriers, Inc.*, 148 F. Supp. 608 (S. D. N. Y. 1957), aff'd., 251 F. 2d 717 (2d Cir. 1958); *Raidy v. United States*, 153 F. Supp. 777 (D. Md. 1957), aff'd., 252 F. 2d 117 (4th Cir.), cert. denied, 356 U. S. 973 (1958).

hence the United States, as owner of the ship, cannot escape responsibility by placing a contractor in charge of the ship. In other words, we would have, if libellant's theory were followed, something like, and even greater than, the insurer's liability for seaworthiness which an owner fails to fulfill at his peril.

But the legal responsibility for the place in which a workman carries on activities is not an insurer's liability for safety but responsibility only for the exercise of reasonable care with regard to the premises at which work is done. It is a nondelegable duty but not an absolute one. It is rather a nondelegable obligation that reasonable care shall be used. This was pointed out with clarity by this Court in *Barbazon v. Belships Co.*, 202 F. 2d 904 (3d Cir. 1953), and reiterated by us in *Osnovitz v. United States*, 204 F. 2d 654 (3d Cir. 1953).

So far as these premises were concerned there was no lack of safety. Even if the plug was loose that did no harm to West or anyone else. The accident to West came because a fellow employee of the contractor did a positive and negligent act. For such super-added, affirmative conduct, the owner of the premises is not responsible. See 2 Restatement, Torts § 426 (1934).

We come then to the problem of seaworthiness. Here is a responsibility not discharged by the exercise of reasonable care. *Mahnich v. Southern Steamship Co.*, 321 U. S. 96 (1944). In *Seas Shipping Co. v. Sieracki*, 328 U. S. 85 (1946), this protection was extended to a stevedore who was doing seamen's work.²

² At least the theory was that he was doing seamen's work although it is now asserted that the premise is incorrect. See Tetreault, *Seamen, Seaworthiness, and the Rights of Harbor Workers*, 39 Cornell L. Q. 381, 413-14 (1954).

We do not think that the "Mary Austin" at the time of this accident was a ship in navigation nor do we think that the work which West was doing was seamen's work so that the warranty of seaworthiness ran to him.

Counsel for the libelant insists that anything floating on the water is in navigation although he concedes that an uncompleted vessel just launched is not in navigation. See *Franke v. Bethlehem-Fairfield Shipyard, Inc.*, 132 F. 2d 634 (4th Cir. 1942). But cf. *United States v. Lindgren*, 28 F. 2d 725 (4th Cir. 1928).

The closest ruling authority is *Desper v. Starved Rock Ferry Co.*, 342 U. S. 187 (1952). There sight-seeing boats had been hauled up on the shore for the winter layoff. The Court held that the warranty of seaworthiness did not extend to the libelant's decedent who was fatally injured while engaged in painting and repairing these vessels in preparation for their seasonal launching. We do not find in the Court's discussion in that case any such rule of thumb test as contended for by the appellant. We think the reason which controls here is that the vessel was out of service as a ship fully and as completely as a vessel which has just been launched but which is not yet ready for service as a ship. See *Harris v. Whiteman*, 243 F. 2d 563 (5th Cir. 1957); cf. *Gonzales v. United States Shipping Bd.*, 3 F. 2d 168 (E. D. N. Y. 1924). See also *Owens v. United States*, 1958 Am. Mar. Cas. 216 (S. D. Fla. 1957) (a case similar to ours). It is not as though the "Mary Austin" had finished a voyage and was having repair work done before resuming business again. This ship had been laid up for some time and had to be thoroughly rehabilitated before getting back to service. She had no crew, contrary to argument made by libelant. There were employees

of the United States on the ship. They had signed no articles and they were there not as a ship's crew but as inspectors on behalf of the United States to see that the work was done in accordance with the contract.

The same sort of argument applies to the work which West was doing. It may be possible to say, as the Supreme Court has, that a stevedore loading or unloading a ship (*Sieracki, supra*), or a carpenter repairing grain-loading equipment on a ship in active navigation (*Pope & Talbot, Inc. v. Hawn*, 346 U. S. 406 (1953)), are performing work of a maritime nature. But this libellant was a shoreside engineer who came on board to work on the rehabilitation job preparatory to getting the ship back into service. That is not something which bears any resemblance to marine navigation.

Each of these cases differs from the next in some respects of course. We find *Berryhill v. Pacific Far East Line, Inc.*, 238 F. 2d 385 (9th Cir.), cert. denied, 354 U. S. 938 (1957), and *Raidy v. United States*, 252 F. 2d 117 (1958), assuming and adopting the trial court's opinion reported in 153 F. Supp. 777 (D. Md. 1957), cert. denied, 356 U. S. 973 (1958), helpful and very close to ours. Judge Hand puts it well in *Berge v. National Bulk Carriers Corp.*, 251 F. 2d 717 (2d Cir. 1958), "Obviously there must be some limit, else the whole fabrication of a new ship would be included [within the *Sieracki* rule]. We can only say that the reconstruction of a ship was not traditionally the task of the crew." *Read v. United States*, 201 F. 2d 758 (3d Cir. 1953), is distinguishable, from the instant case at least, on the amount of work involved.

The judgment of the district court will be affirmed.